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British Guiana. Court of Review.

A COLLECTION OF CASES

DECIDED IN

THE COURT OF REVIEW

OF

British Guiana,

FROM 1856 TO 1872,

EDITED BY

J. ALVES, F. E. DAMPIER & BENSON MAXWELL, ESQUIRES,
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IN offering to the Judicial Bench, the Bar, the Magistrates; and the Public this collection of Review Cases, the Editors feel bound to apologize for the delay which has unavoidably occurred in its publication. The necessity of careful supervision, in order to ensure accuracy, must be their excuse.

It is believed that the present collection contains all the cases of any real value to officers concerned in the administration or execution of the Law as it at present stands. Many cases decided under repealed or obsolete Ordinances have been reported, where it has been thought that the decisions on them might be valuable in assisting to construe correctly subsequent or analogous Ordinances, a use to which cases on repealed statutes are frequently put in England. At the same time many cases have been omitted in which no general principle of law has been at issue, and of which the publication would only involve unnecessary bulk.

The Editors have to express their cordial thanks to the Chief Justice and the Judges, to the members of the Bar, the Registrars, and their brother Magistrates for the kind encouragement received by them in carrying out their scheme of publishing this work, a work which it is hoped may be of as much use in its present form as it has been to the Editors while yet unprinted.

J. A.
F. E. D.
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DEMERARA,
June, 1873.

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COURT OF REVIEW CASES.

THE QUEEN *v.* JOSEPH DUNBAR.

20th September, 1856.

(Ordinance 20 of 1856—Section 2, Clause 2 and Section 4.)

Larceny.

Jurisdiction of Magistrate limited to cases where Property stolen does not exceed in value ten dollars. Flogging.

THIS was an appeal from a decision of Mr. J. D. FRASER, S. J. P.

ARRINDELL, C. J., gave judgment as follows :—

This application for a Review of the conviction by James Denholm Fraser, Stipendiary Justice of the Peace, on the 10th of September, present, of Joseph Dunbar, has been made on the ground, as related by the Pro Sheriff of Essequebo, for the prisoner, that the Magistrate had no authority to sentence him, Joseph Dunbar, to be flogged as he is about thirty-five or forty years old.

There is no evidence of the age of Joseph Dunbar, and except his own assertion it does not appear that he is thirty-five or forty years of age, or that he is under or above the age of sixteen years, mentioned in Section 4 of Ordinance No. 20 of the year 1856.

Passing over this ground, it appears, on the face of the conviction, that the offence for which Joseph Dunbar was convicted, was, "that "he did on the 30th August, 1856, feloniously take, steal, and carry "away one canister, value Five Dollars, one hammock, value Eleven "Dollars, and other articles value Five Dollars," (together Twenty-one Dollars) "the property of "François Lambat"—and that for this offence he had been sentenced "to be imprisoned in the jail at "Capoey, in the Colony, with hard labour, for the space of thirty "days," and *should* also receive Twenty-five "lashes."

This theft of property exceeds in value, the sum of Ten Dollars,

to which, in *such* a case, the authority or jurisdiction of the Magistrate is limited.

Without therefore entering into any other reason, the excess of jurisdiction is sufficient to authorize me to quash the conviction, and I therefore hereby quash the aforesaid conviction of the Tenth of September, Eighteen Hundred and Fifty-six.

THE QUEEN *v.* ABRAHAM ALLAY.

20th September, 1856.

(Ordinance 20 of 1856—Section 1, Clause 1.)

Insulting language, when tending to provoke a breach of the peace. When unmeaning words may be considered insulting.

THIS was an appeal from a decision of Mr. CARBERY, S. J. P., by which he convicted the defendant for having used to a soldier the following words: "Will you buy a dog." The charge alleged that these words were insulting words, whereby breach of the peace might have been occasioned, to one private Edward Romer, of Her Majesty's 1st West India Regiment.

ARRINDELL, C. J., gave judgment as follows:—

It is quite clear that by the Law of England, anything that tends to provoke or incite others to break the peace, is an offence punishable by fine and imprisonment.

In the present case however, the Ordinance No. 20, of the year 1856, Sec. 1, declares, that "any person who shall commit any of "the offences hereinafter mentioned in this Sec. shall be liable, on "conviction, to imprisonment with or without hard labour, not "exceeding fourteen days, or to a penalty not exceeding ten dollars."

"First—Every person who shall commit a breach of the peace "not deserving of a more severe punishment, or who shall *use any* "threatening, abusive, or *insulting words*, or behaviour, with "intent to provoke a breach of the peace, or *whereby a breach of* "*the peace* may be occasioned."

The appellant says that "he does not think the language said to "be used by him, can be considered provoking or likely to occasion "a breach of the peace."

I am of a different opinion, and I consider the view taken of these words by the convicting Magistrate to have been correct.

The words in themselves are unmeaning and unimportant, but it

is well known, that when put to a soldier, they bear a latent meaning, understood by him of a most offensive and insulting character.

That they are therefore extremely likely to provoke a breach of the peace, and that by their use to a soldier, a breach of the peace may be occasioned.

It is not shown that Abraham Allay had a dog for sale, and his therefore asking the question and repeating it twice, was gratuitous and wanton.

If men with or without intention to provoke a breach of the peace, will use or hold out towards others insulting words, whereby a breach of the peace may be occasioned, they must take the consequence of such conduct, and which in this case is punishment under the Ordinance. I do therefore confirm the conviction of the 12th of September, 1856, by Edward Carbery, Stipendiary Justice of the Peace, of Abraham Allay, for having used to a soldier, insulting words which might have occasioned a breach of the peace. *

PROUSE TRAP *v.* HUGH M'NEIL GREEN.

3rd April, 1857.

(Ordinance 2 of 1853.)

Employer and Servant.

Contract not illegal for providing that all the work must be finished in a certain time or else none would be paid for.

THIS was an appeal from a decision of Mr. CARBERY, S. J. P., in an action brought to recover money due for labour performed at Plantation *Reliance*. The appellant was employed as a field labourer under an implied monthly contract. His pay was stopped at the end of one week because he had not finished the rows he had commenced to work upon, and this action was brought to recover the amount so stopped. The Magistrate decided in favour of the plaintiff.

ARRINDELL, C. J., gave judgment as follows :—

Having read the complaint, the evidence, the conviction, and the reasons of grounds of the review.

Firstly—I do not see any provision in Ordinance No. 2 of 1853 affecting this case.

Secondly—Sec. 1 of said Ordinance cannot be so construed so as to place the parties beyond the pale of the general law.

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* Upon enquiry the Editors have learned that the meaning attached by the black soldiery to the words complained of in this case is unfit for publication.

Thirdly—I cannot see that a contract to the effect that the employer should pay for a certain quantity of work, say weeding three beds, one guilder, but that if the whole of the three beds were not weeded in one day, he would not pay, and the employed should not be entitled to demand and recover for any less quantity than the three roods, would be contrary to law.

Fourthly—The evidence in this case does not satisfy my mind, that such a contract was clearly understood and entered into by both parties, and as no such contract has been proved to have existed, it appears to me, that the conviction is correct, and must be confirmed, and I hereby confirm the same accordingly.

HENRY CLEMENTSON *v.* JOHN COMACHE.

18th April, 1857.

(Ordinances 7 of 1854—Section 41, and 19 of 1856, Section 29.)

Immigration.

Knowingly employing Immigrant indentured to another person. Onus probandi. Penalty—"Month" to mean Lunar Month—Rejection of Evidence.

THIS was an appeal from a decision of Mr. S. H. GOODMAN, S. J. P., and the facts appear to have been as follows :—

Manoel Martens, an indentured labourer to Plantation *Cuming's Lodge*, left that estate and worked for other people, amongst whom was the defendant Comache. There was no evidence before the Magistrate that defendant knew of Martens being so indentured.

The charge against the defendant was for "employing Manoel "Martens an indentured labourer at *Cuming's Lodge*, from the "1st January to 18th March, 1857, 66 days."

ARRINDELL, C. J., gave judgment as follows :—

By Ordinance No. 7 of 1854, Sec. 41, it is provided, that in every case in which any dispute or difference shall arise, as to whether any person, who shall have harboured, concealed, or employed any immigrant being at the time under a written contract to labor, had knowledge of any such immigrant being at the time under such contract, the proof of the absence or want of knowledge of every such person shall be on such person, and the proof of the knowledge shall not be on the part of the party aggrieved, or complaining or informing. Such being the law, I find that the defendant in the

present case after having pleaded "not guilty" admitted that he "employed the man" for one month to cut grass, and then added "I did not know he was an indentured labourer." In support of this assertion, no evidence was produced or tendered to the Magistrate.

A string of objections have since been submitted, but they are of no avail after conviction.

By the 29th Sec. of Ordinance No. 19 of 1856, "the Judge sitting "in Review may, in any case where it shall appear to him that any "evidence has been *rejected*, refer back such case to the Stipendiary "or Special Justice of the Peace, to take the *evidence rejected*, and "such other evidence as the Judge may deem necessary, and "forward the same to the Registrar."

In this case, it does not appear, that any evidence was rejected, and consequently that any evidence was improperly rejected. And I therefore have no authority to refer back the case to the Stipendiary or Special Justice.

The Magistrate has ordered or condemned the defendant to pay, besides the fine of Five Dollars, "Thirty Dollars for the month, equal to One Dollar per day."—This is wrong in form,—the Ordinance says "One Dollar for each day." The defendant admitted that he employed the immigrant for one month.

This, in the absence of the word "Calendar" prefixed, as the proceedings are penal, must mean a Lunar Month of twenty-eight days, from which deduct four days for Sundays and there will remain twenty-four days.

Thus, the defendant should have been convicted in the sum of Twenty-four instead of Thirty Dollars.

I confirm the conviction, under a deduction of the Six Dollars for the six days explained as above.

JOHN BELL *v.* DAVID WATT SAMUEL AND THOMAS GIBSON.

6th June, 1857.

Sufficiency of Evidence.

THIS was an appeal from a decision of Mr. J. LOCKHART MUIR, S. J. P., on a complaint against the defendants that on or about 28th April last, (1857), D. W. Samuel and Thomas Gibson, did steal twenty-three

hardwood beams, value Eight Dollars, and one hundred spars, value Seven Dollars—the property of the said John Bell.

The facts appear in the judgment.

ARRINDELL, C. J., gave judgment as follows :—

In this case David Watt Samuel has sought a Review. He has not appeared to support his case in Review, I must therefore take the Magistrate's report, that a verbal notice of Review was given on the ground of insufficiency of evidence.

I have read the evidence, and as respects the one hundred spars, it is as follows :—

John Bell sworn, says: "In the latter end of April I was up the "Creek, at Juan De Abro's grant, for a week; on my return, I found "upwards of one hundred spars cut on my land. On the 28th I "saw the defendant David Watt Samuel removing them, I stopped "them being carried away. I have no personal knowledge as to "who cut them, except that Samuel told me he had cut them. "I gave him no permission to cut any."

Henry Smith sworn, says: "I know he (meaning Samuel) did cut "spars."

Samuel himself admits of his cutting spars, but that he told Mr. Bell that he had done so, and that Mr. Bell said "very well."

It is clear that Samuel cut the spars without permission, first had and obtained, and the question then arises, whether the words "very well" said after the spars had been cut, and after Samuel had told Mr. Bell he had cut them, amounted to a permission. The Magistrate seems to have thought not, and I agree with him.

It appears to me that the evidence, if the Magistrate believes it, was sufficient,—such evidence I should have left to a jury, and had the jury returned a verdict of guilty upon it, I should have been satisfied.

I dismiss the Review. I confirm the decision of the Magistrate, and order David Watt Samuel to pay all expense of Review.

JAMES S. HITZLER *v.* PETER ANDREW CLOUSTON.

12th August, 1857.

(Ordinance 20 of 1856.)

Abusive Language.

Magistrate the sole judge of the facts. Practice of Review Court assimilated to practice of Judicial Committee of H. M.'s Privy Council.

THIS was an appeal from the decision of Mr. W. McNULTY, S. J. P. The complainant before the Magistrate, alleged that he had been

grossly insulted by the defendant, and the defendant denied it. The Magistrate dismissed the charge on the ground that the evidence was so conflicting as to raise in his mind a reasonable doubt as to the guilt of the defendant.

ARRINDELL, C. J., gave judgment as follows :—

In determining cases of this kind the Court cannot have a better guide, than the practice of the Judicial Committee of Her Majesty's Privy Council.

By that High Court, it has been determined that "when a Court "below has decided upon a case, depending on questions of facts "alone, the Committee will not advise a reversal of its judgment, "unless there appears some clear distinct point, in which they are "wrong, although doubts may be entertained as to its correctness."— 2, Knapp's Reports, page 265.

* In the present case, the Magistrate, upon a Review of the whole evidence, entertained a doubt of the defendant's guilt, and gave him the benefit of that doubt,—this, according to the doctrine cited above, is not a case for Review. I therefore dismiss the Review.

BAHADOOR, *alias* BIG BAHADOOR *v.* WM. HUMPHREYS, STIPENDIARY MAGISTRATE.

6th March, 1858.

(Ordinance 29 of 1856—Sections 8 and 18.)

An Immigrant making a charge before a Magistrate cannot be refused justice because he has not complied with registration laws. Practice of Magistrate's Courts.

THIS was an application for a Review of the proceedings of Mr. W. HUMPHREYS, S. J. P. The facts appear in the judgment.

ARRINDELL, C. J., gave judgment as follows :—

I order William Humphreys, Stipendiary Magistrate of District G., to pay back to Big Bahadoor, the sum of Five Dollars and Twelve Cents for the following reasons :—

In this case, the Attorney-General, acting for and on behalf of a Coolie labourer, applied for a Review of the proceedings of William Humphreys, a Stipendiary Magistrate, on the Nineteenth November last.

No complaint and minute of the evidence, no conviction, no

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* Judgment in the same words was pronounced by the same Judge in a case of *Butler* v. *Vandyke*, on the 5th September, 1857.

order of dismissal, no commitment, no document containing any statement of what was done, or any evidence of the Magistrate's proceedings, had been produced.

The facts of the case, taking them from the party himself and from the Magistrate, who has appeared in his own behalf, and allowing the latter full credit for all that he has stated, are these—

On or about the 15th November last, Big Bahadoor, having been beaten and bitten on his private parts by Little Bahadoor, complained to Mr. John Walker Thompson, his employer, who drew out a complaint for him, against Little Bahadoor, for assaulting and beating him, and for having bitten him on "a certain part." Mr. Thompson, at the same time, wrote a note to Mr. Humphreys, informing him that he considered it a grievous matter.

Big Bahadoor carried the complaint and note to Mr. Humphreys, who asked him if he had taken out his Registration Ticket. He said he had the old one.

The Magistrate says, he told Big Bahadoor that he must take out his Ticket for this year, and attend the Court to be held at Suddie, on the Nineteenth of the month.

On the Nineteenth, Big Bahadoor made his appearance at Suddie, before the Magistrate, Mr. Humphreys, whereupon he was asked by Mr. Humphreys if he had his Ticket, and answering in the negative, Mr. Humphreys declared his complaint dismissed, with costs, fined him Five Dollars for not having taken out his Ticket, and ordered him to be imprisoned for two days unless the fine and costs should be sooner paid. The man was taken and kept in custody by the Constable or Policeman in attendance on the Court.

The prisoner sent to his friends, who furnished the money to pay the fine and costs, and upon their being paid he was released.

Feeling aggrieved he complained to those interested in him. The matter appeared to have created a sensation—upon which Mr. Humphreys drew up, in his own handwriting, a petition in which he in the name of this man, makes among others, the following statements :—

"Your petitioner was, on the 19th November last, convicted by "Mr. Humphreys, the Stipendiary Magistrate of district G, and "fined Five Dollars for appearing before him to prosecute a case, "punishable on summary conviction, in which your petitioner had "a personal interest, because your petitioner had no provisional "Ticket of Registration, or Certificate of Registration."

"That your petitioner being an illiterate person and ignorant of "the Law, was not aware at the time that he was entitled to appeal "to your Honor, and claim to have the decision of the Magistrate "reversed."

This petition being presented to me, and my attention being

called to the fact that it was in the handwriting of the Magistrate, of whose conduct the petitioner wished for a Review; I caused it to be laid before the Governor, that he might instruct the Attorney-General to act for Big Bahadoor.

These being the facts, I find no difficulty in declaring Mr. Humphreys' proceedings to be illegal.

Firstly—The Law, (Ord. No. 29 of 1856, Sec. 8), altered the period between the first of October, and thirty-first December, for Registration and payment, and the granting of the Certificate, and no one could be held guilty of an offence punishable with a penalty not exceeding Fifteen Dollars, and not less than Five Dollars, for not obtaining his Certificate, until the expiration of the whole term so allowed by the Ordinance.

Secondly—This was applicable to the case of Big Bahadoor, even had it been one in which he had a "pecuniary or private interest," in terms of Section 18 of said Ordinance, but it appears that he had no pecuniary or private interest. Mr. Humphreys in the petition, which he wrote for Big Bahadoor, used the word "personal." It is immaterial whether the word "personal" or "private" be used, for either of them, if used, would be sufficient for the purpose of distinguishing a private or personal wrong from a public wrong.

In the case before me there is no doubt that any private wrong suffered by Big Bahadoor was merged in the public wrong of an assault and battery, a breach of Her Majesty's peace.

Wrongs are divisible into *private wrongs*, which, being an infringement merely of particular rights, concern individuals only, and are called civil injuries, and *public wrongs*, which, being a breach of general and public rights, affect the whole community, and are called crimes and misdemeanours.

The offence complained of was a misdemeanour.

Thirdly—Whether the assault and battery complained of, were cognizable under either of the Ordinances alluded to by the Attorney-General, is of no consequence, a breach of Her Majesty's peace, a public wrong was complained of, and such public wrong did not give to Big Bahadoor, any of the pecuniary or private interest contemplated by Ord. No. 29 of 1856, Sec. 18.

Fourthly—The conduct of Mr. Humphreys has been so irregular that I know not how to designate it.

There were no proceedings reduced into writing except the complaint, which he says he has destroyed; although he has compelled the man to pay Twelve Cents for a conviction, there is no conviction, and I cannot quash it; and lastly, there is no commitment, although he says—"as soon as the Court was over, I went to get my horse, "and was then told the man had paid the fine and was released."

Thus showing, that there was not only no commitment, but no intention or thought of drawing out one. I can only frame my order according to the circumstances of the case. It is clear that the fine of Five Dollars and the Twelve Cents for the conviction were illegally exacted and received.

I therefore order William Humphreys, Stipendiary Magistrate of district G, to pay back to Big Bahadoor, the sum of Five Dollars and Twelve Cents. *

CHARLES NICOLSON *v.* THOMAS BENJAMIN ROBSON.

13th March, 1858.

(Ordinances 12 of 1848—Section 13 and 11 of 1857, Sections 2, 3, 4, 7 and 66.)

Militia.

Qualification for, when Income uncertain.

THIS was an appeal from a decision of Mr. W. McNULTY, Police Magistrate. The appellant was charged by the respondent (who was duly authorized by the Adjutant General), with failing to enrol himself in the Georgetown Militia, under Ord. 11 of 1857. Appellant pleaded guilty, and stated that his income was under 350 dollars a year, and that he was willing to make oath to that effect. The Adjutant General offered to withdraw the charge on appellant making such oath, but appellant then refused to do so, and was convicted and fined 24 dollars.

In his reasons for Review, the appellant stated,

First—That he was a Weigher and Guager, and as such relied on the 13th Sec. of Ord. 12 of 1848, which is not repealed or altered by the 66th Sec. of Ord. 11 of 1857.

Second—That he was not qualified under Sections 2, 3, 4 and 7 of Ord. 11 of 1857, and that no evidence to the contrary has been adduced.

Third—That his income being dependent on his earnings, he was not qualified, though he could not swear that he had not an income of 350 dollars.

ARRINDELL, C. J., gave judgment as follows:—

I dismiss this Review and hereby confirm the order of the Magistrate, of the 13th November, 1857, and order the plaintiff in Review, to pay all costs incurred.

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* A like order was made on the same day by the same Judge, in a case of *Sobran* v. *William Humphreys*, in which the circumstances were similar.

HENRY H. BUNBURY *v.* MOLLY STEPHEN.

13th March, 1858.

(Proclamation of 9th December, 1796—Ordinance 28 of 1847, Section 2.

Killing Goats—Trespassing.

What notice required before doing so. Implied repeal of the Proclamation of 1796.

THIS was an appeal from the decision of Mr. E. CARBERY, S. J. P. The appellant was convicted before him with having unlawfully and maliciously destroyed a Goat and two Kids, of the value of Nine Dollars, the property of the respondent. It appeared that the appellant, (defendant in the Court below) saw a flock of Goats in his cane field, and, having previously given general notice to the people round on several occasions, that their Goats and Hogs would be shot if found there, he (relying on the Proclamation of 1796) fired into the flock and killed the Goats in question.

The Magistrate held, that particular notice to respondent was necessary, but that even if such notice had been given, the appellant's power to destroy Goats trespassing, was taken away by Ordinance 28 of 1847. The appellant was fined.

ARRINDELL, C. J., gave judgment as follows :—

I have affirmed the Order of Conviction in this case.

Firstly—Because, even were the publication of the 9th of December, 1796, in force, still, by the fifth Section of that Proclamation, the appellant was bound to give notice of the trespass twice to the owner of the Goats before he was free to shoot or kill such Goats.

Secondly—Because such notice ought to have been given to the owner of the Goat, and therefore ought to have been special, and not general as stated by the appellant.

Thirdly—Because I am of opinion that as Ord. No. 28 of 1847, Sec. 2, includes Goats, the penalty of the trespass of which is impounding; this penalty being a milder one than the one mentioned in the Proclamation of 1796, the latter Statute inflicting a milder punishment, than the preceding Statute for the same offence, repeals by implication the Proclamation of 1796.

JAMES LIGHT *v.* GEORGE CHAPMAN, HENRY JONES, AND SIMON BOSTON.

17*th April*, 1858.

(Ordinance 31 of 1856—Section 9.)

Estates' Armed Force.

Powers of Divisional Captain, and of Manager of Estate. Notice to attend Parade, how to be served. Construction of Statute.

THIS was an appeal from decision of Mr. E. CARBERY, S. J. P., and the facts of the case are as follows :—

The appellant, as Divisional Captain of the Estates' Armed Force in Essequebo, issued the following notice :—

Plantation *Anna Regina*,

22nd March, 1858.

To the Managers or Persons in charge of the following Estates, Namely :—

Plantations *Richmond, Henrietta, Reliance, Mainstay, Land of Plenty, Three Friends, Aberdeen, Columbia, Affiance, and Taymouth Manor.*

GENTLEMEN,—

You are requested, in accordance with Sec. 9 of the Ordinance 31 of 1856, to attend and also to select the one-half of such persons, on your Estates as are enrolled in the Estates' Armed Force, to assemble on Thursday next, the 25th instant, at 3 o'clock, p.m., in front of Plantation *Land of Plenty;* the place of rendezvous, for parade.

JAMES LIGHT,
Captain of Division No. 2,
District No. 1.

The respondents not having attended parade were charged by appellant, for that they being privates in the Estates' Armed Force of Division No. 2, District No. 1, in the County of Essequebo, did neglect and fail to attend the parade of the Estates' Armed Force, of the said Division No. 2, on the 25th March, 1858, at Plantation *Land of Plenty*, in the said County.

On the hearing of this charge the following evidence was given:—

Hugh Mc Neil Green, sworn: I am Lieutenant in the Estates' Armed Force of Division No. 2, District No. 1. I know the two defendants, George Chapman and Samson Boston. I do not recollect ever having seen Henry Jones. The defendants are enrolled in the Estates' Armed Force of Division No. 2, as liable to serve for Plantation *Richmond*. I was at parade on the 25th March last, at *Land of Plenty*; I was in command; neither of the defendants was present; I believe Mr. Miller is Manager of Plantation *Richmond*; he is not enrolled in the Estates' Armed Force; I do not find his name in the list.

William Bollers, sworn: I am a private of the Police Force; I remember being sent round with a paper to the Estates in this district. Sergeant Brennon told me to take a notice that he gave me as far as *Richmond*, and to show it to the Managers; the paper I hold in my hand is something like what I carried round; it is a notice to warn the Managers of certain Estates to select the men to meet at *Land of Plenty* for parade on the 25th March. The paper I hold in my hand is the same wording as the paper I carried round; I did not take a copy of the paper I carried round; I did not put any mark upon the paper I carried round in order that I might identify it. When I state that the paper I hold in my hand is the paper I carried round, I state so from memory, not having kept a copy of it; I carried the notice to Plantation *Richmond* on the afternoon of the 22nd March; I handed it to Mr. Miller, the Lessee of *Richmond*, and he read it, and returned it to me; he said very well; I saw him looking at the paper, he opened it. Mr. Miller asked me, before he looked at the paper, what I brought, and I told him it was a notice to select his men for parade at *Land of Plenty* on the 25th March.

Edward Brenwood, (called by the complainant) sworn: this is the document I gave the last witness William Bollers, to take round to the Estates—it is dated 22nd March.

Robert Miller, sworn: I live at *Richmond*; I am Lessee of the Estate and Manager; I know the defendants. Mr. Chapman resides on the Estate and is an Overseer, Henry Jones resides on a leased Lot in front of *Richmond*; he left my employ about a week since. Samson Boston is not permanently in my employ; I employ him sometimes in a task gang; I did give in the names of the three defendants as persons liable to serve in the Estates' Armed Force for Plantation *Richmond*; I have never received any guns or ammunition from the Registrar for *Richmond*. One evening last month, a Policeman came to me and gave me a paper; I knew it was about turning out the Estates' Armed Force. I thought no more about the notice until I saw it here the last Court day, the 6th, and then I saw it was for the 25th March. It was a notice from

Captain Light, the complainant; I did not tell the three defendants to turn out on the 25th March; they had no notice of the parade of that day from me; I don't know why I did not give notice; I gave no one notice on the Estate to turn out on the 25th March; I do not admit that Captain Light has, as Divisional Captain, any right to send me orders.

The Magistrate gave the following decision :—

The defendants are acquitted. Section 9 of the Ord. No. 31 of 1856, authorises the Manager, or person in charge of the Estate, to select the one-half of the persons who are to do duty at parade, or any parade day that may be appointed by the Divisional Captain. The Manager is constituted by the Ordinance the intermediate Agent between the Captain and the Privates of the Estates' Armed Force; they are to be selected and chosen by the Manager; the Divisional Captain has no power to summon them nominally, or individually for the monthly parade. The Manager has the privilege of selecting the persons who are to attend parade from the Estate of which he has the charge; and if as in this case, it is proved that the Manager has failed or refused to give notice of the parade day to persons residing on the Estate, and has not selected any persons for parade, it seems to me clear that they cannot be convicted and punished for non-attendance.

On the 13th April, 1858, the Magistrate sent to the Court of Review further reasons for his decision, which are as follows :—

I would state in addition to the preceding decision, which was written and read in Court, that my acquittal of the defendants rested on the ground that they had neither received notice of the parade day of the 25th March 1858, nor had they been selected by the Manager of Plantation *Richmond*, to attend the parade of the 25th from that Estate. No question was raised as to the legality of the notice served by Captain Light on the 22nd March, on Robert Miller, Manager of *Richmond*. It is only this witness, Robert Miller, who in one of his answers to the complainant, tells him that he (witness) does not admit complainant's right to send him orders as Divisional Captain. I am unable to arrive at any other conclusion than that the Section 9 of Ordinance No. 31 of 1856, gives to the Manager or "person in charge of the Estate," the right of selecting for parade on each and every parade day, the one half of persons enrolled. He is enjoined or authorised to select, the legal complement, that is the one half of the men enrolled to serve for the plantation, of which he is the Manager; but the nomination, or selection of the individuals for each parade day, rests solely with him, and if this be a correct view of the Law, it follows, that only those persons who are selected by the Manager for parade on any parade day, are legally liable to punishment if they fail to attend.

The words of the Section "One half of such persons" and "the remaining half" refer I think to numbers, not to individuals. The Manager should select the legal number, the one half of the force on the Plantations, each parade day, but the selection of the individuals comprising that half, is a privilege given to him by the Law. The meaning of the Section (9) I take to be that the day of parade in each month being fixed by the Division Captain, the Manager may select any of the persons enrolled, to the number of one-half, to attend on each parade day; but if he fails to do so, and selects no one, no one I think can be fined for non-attendance. Here two of the defendants, George Chapman and Henry Jones, were hired servants in the employ of the Manager, and could not have quitted the Plantation to attend parade unless directed by the Manager to do so.

ARRINDELL, C. J., gave judgment as follows:—

In this case it is evident, if the evidence is to be believed, that the defendants had not the notice required by the Ordinance, and I do not see how the Magistrate could have convicted them in penalties, when it was distinctly proved that they had not had notice.

I confirm the sentence of the Stipendiary Magistrate with condemnation of the claimant for Review, James Light, in all costs.

MARIA DE JESUS *v.* JOHN BRUMELL, REGISTRAR OF DISTRICT No. 4.

21*st June*, 1858.

(Ordinance 19 of 1856—Sections 20 and 21.)

Evidence.

Witness in reply may be examined. Defendant not to be examined on Oath.

THIS was an appeal from the decision of Mr. W. Mc NULTY, S. J. P. The only fact of importance in the case was that the Magistrate refused to examine the appellant (defendant in the Court below) on oath, and that he allowed a witness (A. A. Burrowes) to be examined on behalf of the respondent (complainant in the Court below) in reply.

ARRINDELL, C. J., gave judgment as follows:—

I confirm the decision of Wm. Mc Nulty, S. J. P., dated 4th June, 1858, in this matter, with condemnation of the plaintiff in Review, in the costs.

First—Because the evidence of A. A. Burrowes, whether material or not, was admissible in reply under the provisions of Ordinance No. 19 of 1856, Sec. 20.

Secondly—Because the proceedings before the Magistrate were in their nature criminal, and the evidence of the defendant was properly rejected. The 20th Section is ambiguously worded and would, without Section 21, lead the reader to suppose that the prosecutor and defendant were to be heard, in other words, make their statement respectively under oath, but as the 21st Section confirms this right to the procesutor, it is quite clear that the word "hear" can bear no other meaning than that attached to it, when speaking of a Judge hearing and determining a case.

JOHN FAIRMAN *v.* KATHARINE READ AND DONALD SWINY.

10*th July*, 1858.

(Ordinance 28 of 1847—Section 4.)

Unlawful Impounding.

Magistrate the sole judge of facts.

THIS was an appeal from a decision of Mr. J. L. MUIR, S. J. P. The defendants were charged with having driven two Goats off complainant's property with the intention of impounding them. The Magistrate dismissed the complaint, remarking—

"There is not the slightest evidence to show that the Goats, or "either of them, were driven off the property of complainant, or "any gap made in his fence by the defendants with the view of "making them strays. On such evidence only, can a conviction "under this Section of the Ordinance be sustained."

* * * * * * * *

"The only order that could have been made (*i. e.*, supposing "defendants to have unlawfully caught the Goats) would have been "to repay the full expenses of poundage and return the goat to the "property to which it belongs."

BEETE, J., gave judgment as follows :—

I confirm the decision of J. O. Lockhart Muir, S. J. P., dated 18th June, 1858, with condemnation of the plaintiff in Review in the costs, for the following reason :—

Because the decision of the Magistrate was founded on the evidence of the witnesses examined in his presence, and consequently he was much better qualified to decide on the credit to be given to

them respectively, than I can be from merely reading that evidence reduced into writing. At the same time, I do not consider Mr. Muir's construction of the latter part of the 4th Section of Ordinance 28 of 1847, correct; but that when any one of the offences under that section has been committed, and the animal in question has been impounded before the detection of the offence, payment of the full expenses of poundage and of returning such animal to the property to which it belongs, must be ordered to be made by the offender in addition to the penalty imposed on him.

ROBERT JOHNSTON *v.* WILLIAM SMITH.

10th July, 1858.

(Ordinance 2 of 1853—Sections 4, 5 and 11.)

Master and Servant.

Power of Master to stop wages when discharging Servant for misconduct—Discretion of Magistrate in abating wages.

This was an appeal from the decision of Mr. J. McLEOD, S. J. P. The respondent, Smith, having served appellant as groom for 25 days, was discharged for misconduct, and brought this action to recover his wages. The appellant at the trial before the Magistrate urged that the wages were forfeited by respondent's misconduct. The Magistrate refused to abate the wages, and this appeal was brought.

BEETE, J., gave judgment as follows:—

I confirm the decision of John McLeod, Esquire, S. J. P., dated the 8th of June last past, with condemnation of the plaintiff in Review in the costs, for the following reasons—

Firstly—Because by Section 4, of Ordinance No. 2 of 1853, if any menial servant be guilty of wilful misconduct or ill behaviour, he is, on conviction, liable to a fine not exceeding Ten Dollars; and by Section 5 of the same Ordinance, the Justice before whom the complaint is heard, may, in addition to such fine, abate the whole or any part of the wages due to such servant.

The defence, therefore, set up by the appellant before the Magistrate, that the wages were forfeited on the ground of misconduct, is untenable in as much as it would amount to making the employer judge in his own case.

Secondly—Because, although the appellant, when he discharged the complainant on the evening of the 25th May for alleged mis-

conduct, was entitled to do so under the provisions of Section 11 of the same Ordinance, he was by the same section bound to pay the complainant the wages due at the period of such discharge, and not having done so, the complainant was justified in applying for a summons against him.

ANTONIO FERRARA *v.* AMERAM.

10th July, 1858.

(Proclamation of 1796—Ordinance 28 of 1847.)

Killing Goats—Trespassing.

What Notice required before doing so. Implied repeal of the Proclamation of 1796.

This was an appeal from the decision of Mr. E. CARBERY, S. J. P. The appellant was charged with maliciously killing respondent's goats, and it appeared that he had shot them by order of the Manager of Plantation *Richmond*, who relied on his right to do so under the Proclamation of 1796.

BEETE, J., gave judgment as follows:—

I confirm the decision of Edward Carbery, S J. P., dated the tenth of August last, with condemnation of the plaintiff in Review in the costs, for the following reasons—

I have confirmed the order of conviction in this matter, because, admitting that the publication of "1796" is still in force, two distinct notices are required to be given to the owners of goats trespassing, before the killing of them can be justified; and in this case the only evidence of notice to the owner is that of Henry Jones; "Mr. Miller told me to tell them to put up the goats; I "told complainant and another Coolie." But in my opinion Ordinance No. 28 of the year 1847, is the law by which the penalty for trespass is regulated at present, and repeals by implication the old publication of 1796.

WILLIAM KING *v.* THOMAS ASHBY.

6th September, 1858.

(Ordinance 20 of 1856.)

No Man is to be twice vexed for the same cause.

These were appeals from two decisions of Mr. W. HUMPHREYS, S.J.P. The appellant was convicted before him on two charges; the first

for using indecent expressions and gestures on the public road; the second, for making use of language tending to provoke a breach of the peace. The evidence showed that the offences complained of were both parts of one and the same transaction.

BEETE, J., gave judgment as follows in the appeal from the first decision :—

I confirm the order of conviction in this case, because the evidence, if true, supports the charge, and the Magistrate is the proper person to judge of the truth or falsehood of the witnesses' testimony, with condemnation of the plaintiff in Review in the costs.

And in the second appeal,

BEETE, J., gave judgment as follows :—

I quash the order of conviction in this case, and order the complainant to pay the costs of the summons, hearing, and of Review; because no person can be put in jail, much less punished twice, for the same offence; and it is manifest from the evidence, that both charges are founded on the same occurrences and on the use of the same language.

G. G. AUSTIN *v.* HENRY MOSES.

27th September, 1858.

(Ordinance 33 of 1850.)

Trespass—Evidence

THIS was an appeal from the decision of Mr. J. D. FRASER, S. J. P. Seven pieces of Timber were found on the waterside of Plantation *Hague*. Respondent claimed them, but appellant refused to allow him to remove them, and charged him with wilful trespass in having placed the timber there. No evidence of his having done so was adduced, and the Magistrate dismissed the charge.

BEETE, J., gave judgment as follows :—

I confirm the order of dismissal made by the Magistrate in this case and order the appellant to pay the costs of Review; because there is no evidence of any trespass by the defendant, or that he put the timber at the waterside of Plantation *Hague*, and on the contrary, the witness Edmund Tucker, proves that he bought the seven pieces for the defendant from Indians, and that the timber had been landed two days before he bought it.

CHARLES BAKER *v.* CAMPBELL, Mc FARLANE & CO.

27th September, 1858.

(Annual Tax Ordinance.)

Definition of Word "Counting-house."

THIS was an appeal from the decision of Mr. W. Mc NULTY, S. J. P. Appellant, a Sub-Commissary of Taxation, charged respondent with having occupied a Counting-house without a license.

The room in question was proved to be used for the payment of workmen at the respondents' foundry, and for no other purpose. The Magistrate dismissed the charge.

BEETE, J., gave judgment as follows:—

I confirm the order of dismissal made by the Magistrate in this case, and order the appellant to pay the costs of Review; because I consider the word "Offices" in the Ordinance to apply to the places of business of Barristers, Advocates, Attorneys-at-Law, and the like, and the words "Counting-houses" to those of Bankers, Agents, or Attorneys of absent parties and such like, and not to the mere places where Mechanics, such as the defendants, keep their accounts and settle with those whom they employ, and there is no evidence that the defendants use the place in question for any other purpose.

HENRY GULLIFER *v.* JAMES THOMAS VAUGHAN.

27th September, 1858.

(Ordinance 30 of 1856—Section 33.)

Making up Roads and Repairing Bridges.

Invalidity of part of an Inspector's Notice no excuse for not complying with another part.

THIS was an appeal from the decision of Mr. E. CARBERY, S. J. P. The respondent, an Inspector of Roads and Bridges, for the County of Essequebo, ordered appellant, (the Manager of Plantation *La Belle Alliance*) to cover his road with hard substance, to put the rails of his bridges in order and to paint them, and to make up the approach to the shipping bridge. This order not being complied with, appellant was summoned. At the hearing before

the Magistrate, the appellant tried to prove that the first part of the order was absurd, and could not be complied with; but no such excuse was made regarding the latter part.

BEETE, J., gave judgment as follows :—

I confirm the order of conviction made by the Magistrate in this case, and order the appellant to pay the costs of Review. Because, even admitting that the evidence of the witnesses Canigieter, Light, and Miller, proved that the covering the road with hard substance at this time of the year would be injudicious, and that the notice given to perform that work was unnecessary, it appears that the appellant neglected to perform the other works required by the notice served upon him, viz., the putting in proper order the bridges and hand rails, the painting of the rails, the proper making up of the approach to the shipping bridge and the putting new cross laths to all the bridges; and there is no attempt to impugn the propriety of the notice as regards those works, the omission to perform any one of which, subjects the appellant to the penalty imposed by Sec. 33 of Ordinance 30 of 1856.

J. R. BASCOM *v.* ANTONIO RELVA.

27th September, 1858.

(Ordinance 2 of 1853.)

Master and Servant.

Neglect of duty to be proved, not inferred.

THIS was an appeal from the decision of Mr. J. D. FRASER, S. J. P. The Rum Store at Plantation *Haarlem* was broken into and a quantity of rum stolen. The defendant, who was watchman there, was charged with neglect of duty, *by allowing* the theft of this rum. No evidence of positive neglect of duty was adduced, but it was argued that it was to be inferred from the fact of the Rum Store having been entered. The Magistrate dismissed the charge.

BEETE, J., gave judgment as follows :—

I confirm the order of dismissal made by the Magistrate in this case, and order the appellant to pay the costs of the review; because the evidence does not support the charge of neglect of duty, to establish which against a person in the position of a watchman, some proof should be adduced, either of drunkenness, or absence from, or sleeping on his post, or some other direct evidence of like nature.

A man's guilt is not to be inferred from the occurrence of what might have happened consistently with his innocence.

GEORGE H. GORING *v.* W. F. MERCIER.

4th October, 1858.

(Ordinance 15 of 1858—Section 5.)

Exemption from paying Tax for Cavalry Troop Horse.

THIS was an appeal from the decision of Mr. S. H. GOODMAN, S. J. P. The appellant was convicted for keeping a horse without a license. His defence was that he was a Trooper in the Volunteer Cavarly Corps of Militia, and that the horse was his troop horse. He therefore claimed exemption, but the Magistrate did not allow it.

BEETE, J., gave judgment as follows :—

In this case the order of conviction made by the Magistrate must be quashed. The wording of the Ordinance is too clear to admit of a doubt, and the tenor of the remarks furnished by Mr. Goodman along with the case, leads me to conclude that he himself was quite satisfied of the incorrectness of his decision.

PETER ANDREW CLOUSTON *v.* JAMES THOMAS FRASER.

11th October, 1858.

(Ordinance 12 of 1846.)

Assault not justified by provoking words—Severity of punishment.

THIS was an appeal from the decision of Mr. Mc NULTY, S. J. P. The appellant was fined for assaulting respondent. His principal grounds of appeal were, that he had been provoked by the language of the respondent, and that the fine was excessively heavy.

BEETE, J., gave judgement as follows :—

In this case, I have carefully read and considered the evidence, and see no reason to interfere with the decision of the Police Magistrate. No words can justify an assault; and if the complainant did make use of language, such as would provoke any person to a breach of the peace, and also malicious and calculated to do serious injury to the appellant, as stated by him, the law was open to the appellant, who might have summoned him for using such language, and on proof of the offence, due punishment would have been awarded.

The assault is clearly proved by all the witnesses examined, both in support of the charge and for the defence, although some saw more, others less of what occurred.

As regards the punishment, the Magistrate in forwarding the papers, states that he tried the case under Ordinance 12 of 1846, by which the appellant was liable to a fine of Twenty-Four Dollars; but that taking into consideration the provocation given, he only imposed a fine of Ten Dollars, which looking at the violence of the assault, and the fact of the appellant having been frequently convicted of similar offences, he considered neither oppressive nor contrary to reason and justice.

I fully concur in this opinion, and confirm the finding and sentence with condemnation of the appellant in the costs of Review.

DUBLIN LIVERPOOL *v.* LODOVICK DALY AND LEWIS DALY.

1st November, 1858.

(Ordinances 12 of 1846,* and 19 of 1856.)

Assault.

Corruption of Magistrate.

THIS was an appeal from a decision of Mr. A. F. BAIRD, S. J. P., who convicted the defendants of an assault on complainant. The quarrel arose about the right to cut timber on a portion of Plantation *Inverness*, of which complainant was part proprietor. The reasons of appeal sent in by the defendant Lodovick Daly, were as follows:—

I appeal from the sentence of A. F. Baird, Esq., S. J. P., in the matter of complaint made by Dublin Liverpool, of No. 8 Village—Because I am not satisfied that the case has been tried with impartial justice, as it appeared to me that words had been put into the witnesses mouth to obtain a conviction upon an unfounded complaint.

That had the evidence been taken down as it was given by the witnesses themselves, Dublin Liverpool would have been found to be the party committing the assault, inasmuch as he molested me and forcibly wrested from my hands a piece of firewood which I had cut on the front lands of No. 8 Village, belonging to myself and others.

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* Repealed by Ordinance 20 of 1862.

That there are other reasons which I will reserve, and which I will state to the Judge at the hearing of appeal—repeating my dissatisfaction as to the taking down of the evidence, I beg you will forward this along with the other papers for His Honor the Judge's consideration.

ALEXANDER, J., gave judgment as follows :—

I confirm the conviction in this case with costs.

Respondent holds land by transport—appellant unlawfully comes on that land and cuts wood—Respondent as he lawfully might, endeavours to prevent him, when according to the evidence, he is assaulted by appellant.

The grounds of appeal are, corruption and malice on the part of the Magistrate. I have examined appellant on this point and his reasons for that charge are simply absurd and founded on malice. There is no discrepancy between the evidence of the witnesses; appellant says the Magistrate did not take down the evidence correctly. How could he tell that. The statement of appellant corroborates the witnesses, save as to the shoving, and yet he says the Magistrate did not take it down correctly. I have examined the chart deposited in the Registrar's Office, and the transport passed by appellant and others to respondent, and it is clear that respondent, Dublin Liverpool, was owner in fee, of the *locus in quo;* that Lodovick Daly, the appellant, was a wilful trespasser, and that appellant was justified in all he did, and that Daly acted illegally throughout.

I think the Magistrate dealt leniently with him.

JOHN GORDON *v.* ADAM PARKINSON.

13th November, 1858.

(Ordinance 2 of 1853.)

Employer and Servant.

THE respondent was employed as a labourer at the *Bel Air* (of which Estate appellant was Manager) by one Laycock, who in the evidence is spoken of, first as a "task gang driver," and then as a "general superintendent." He was charged by complainant with neglect of duty, and the Magistrate (Mr. S. H. Goodman, S. J. P.) dismissed the case, on the grounds that the defendant was not complainant's servant, but Laycock's. This was an appeal from that decision.

BEETE, J., gave judgment as follows :—

This case having been forwarded in the first instance with very meagre evidence, and that, such as it was, rather bearing out the decision of Mr. Goodman, I ordered it to be sent back to the present Magistrate for the purpose of giving the complainant an opportunity of proving a direct hiring by himself of the defendant, and also for the purpose of ascertaining the exact relative position of Laycock and the defendant as regards one another and the Estate; and the case is now returned with some additional, but still unsatisfactory evidence.

It does not appear that there was any hiring of the defendant by the complainant for the particular work, nor that the defendant is a labourer under a monthly contract with the complainant, within the provision of Sec. 7 of Ordinance 2 of 1853, but that defendant was engaged by Laycock on the day in question to load punts, and that he did not fulfil his engagement.

There is no evidence of the nature of the contract between these parties; whether Parkinson was to be paid by the task or by the day; whether he was to load punts himself along with other labourers, or whether he himself was to employ others and be paid for the job.

There is no evidence whether Parkinson was to look to the complainant or Laycock for payment; and although the latter now denies having called himself a task-gang manager when before Mr. Goodman, I cannot believe that Mr. Goodman could have been so incorrect as to write the words "task-gang," no less than four times in less than a dozen lines of evidence, if they had not been used both by the Overseer and Laycock.

As there is nothing in the further evidence now forwarded, to remove the impression created by that formerly sent, that the agreement between Laycock and defendant was made independently of the complainant altogether, I can only confirm the Order of dismissal and order the appellant to pay the costs of Review.

C. H. BURROWES, POLICE CONSTABLE, *v.* HENRY CRAWFORD, MANAGER OF *PORT MOURANT.*

16*th* *November*, 1858.

(Ordinances 20 of 1856, 18 of 1858.)

Petty Debt.

Right to Levy on Wages.

THE Complainant in this case went to *Port Mourant*, with a distress warrant to levy upon the wages due to one Deserat. The defendant refused to pay such wages to him, saying to him, "I will not allow you to levy on the money," and, in spite of the complainant's remonstrances, paid Deserat his wages. Complainant summoned defendant for resisting him in the execution of his duty, and the Magistrate, Mr. C. G. H. Davis, convicted and punished the defendant. On appeal—

ALEXANDER, J., gave judgment as follows :—

I affirm the conviction in this case, with costs.

Defendant admits he *prevented* the policeman from levying on the wages he was paying to Deserat; those wages being a liquidated and ascertained sum were debts in the legal sense of the word.

At home, they are personally recovered in an action called *indebitatus assumpsit;* but debt is a concurrent remedy for monies, the amount of which arising out of simple contract and is ascertained.

By Ord. 18 of 1858, Sec. 16, it is enacted—

"That in case a party proceeded against shall not be possessed of goods and chattels sufficient to satisfy the demand, the Creditor under the same Warrant to levy on, and attach any debt due and owing to such party, &c."

This process was attempted in this case, and on his own admission, prevented by him under an erroneous impression regarding the law.

ROSALINE Mc ANDREW *v.* EDWARD H. NOVEL.

12th Nobember, 1858.

Ordinance 12 of 1846,* 3 of 1858.†

Assault—Inflicting actual bodily harm.

IN this case, the complainant swore that the defendant had so severely beaten and kicked her, that she had been ill ever since. A Medical Certificate tended to show that hemorrhage from the uterus had been occasioned by the violence of the assault. The Magistrate, Mr. C. G. H. Davis, summarily convicted the defendant of a common assault. On appeal—

ALEXANDER, J., gave judgment as follows:—

In this case both parties have applied for a Review.—1st. The defendant thinks he should not have been punished at all; and the complainant, because defendant has not been punished enough.

I think the grounds stated by complainant, when pressed, must be allowed, although perhaps it would have been well to let the conviction stand, that the punishment might follow close upon the offence. By Ordinance 3, of 1858, assaults inflicting actual bodily harm, are classed as indictable misdemeanors, in the same category with indecent assaults, and assaults not felonious for want of the intent, but which occasion *grievous* bodily harm.

If the Magistrate believed this woman in part, he must have believed all her testimony, for, if false in one particular, it would be unworthy of credit altogether.

Complainant's charge, if true, involves a brutal, unprovoked, treacherous battery; kicking her when she attempted to rise; striking her heavily on the face; knocking her down; exposing her person; beating her on the ground without a previous word of salutation or provocation.

When I read the evidence, I expressed to the Registrar my intention, under any circumstances, whether complainant applied for a Review, as well as defendant or not, to direct him to write to the Magistrate and call his attention to Sec. 29 of Ord. 12 of 1846, and to Ord. 3 of 1858, Sec. 3, 4 and 8.

Doctor Cameron says, he believes the blood was uterine blood, shed by means of external violence, although it might be from natural causes.

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* Repealed by Ordinance 26 of 1862.

† Repealed by Ordinance 20 of 1862.

Further examination of the Doctor and of the complainant might clear that point. She has been taking medicine ever since that day, and has had fever from the effects of the beating. I therefore think there is evidence of an indictable misdemeanour, under Sec. 8 of Ord. 3 of 1858, and I therefore order the proceedings and conviction to be quashed. The depositions to be sent back to the Magistrate, to be forwarded to the next Inferior Criminal Court. The defendant to give bail to appear at that Court, and the complainant and her witnesses to be bound over to prosecute.

JOHN FYFE *v.* ROBERT BRUCE.

29th November, 1858.

(Ordinance 20 of 1856.)

Resisting Rural Constable.

THE appellant was charged and convicted for having resisted the respondent in the execution of his duty, as a Rural Constable, and also for breach of the peace. The Revd. Mr. Straker, on behalf of appellant, applied for a Review of the Magistrate's proceedings, on the grounds that he had not examined the witnesses for the defence; whereupon Alexander, J., ordered further evidence to be taken. This having been done, the Magistrate (Mr. A. F. Baird) returned the subsequent proceedings to the Court of Review.

ALEXANDER, J., gave judgment as follows:—

In Case No. 495—

Appellant was convicted of having resisted, and assaulted respondent, whilst in the execution of his duty, and sentenced to pay a penalty of $24, or in default, to be imprisoned for one calendar month, with hard labour.

In No. 496—

Appellant was convicted of a breach of the peace, and sentenced to be imprisoned 30 days, with hard labour; it being a second offence for breach of the peace.

Having referred the case back to the Magistrate, to take the evidence of defendant's witnesses, and of Clara Cameron and Louisa Thompson, referred to in the depositions—whose evidence I thought material—the case is now fully before me.

I have read the evidence, the grounds of the application for Review, letters from the Revd. Mr. Straker to myself, and letters

addressed officially by the convicting Magistrate to the Registrar of the Court, and it is my belief that the humane and benevolent feelings of the Revd. Gentleman, have been enlisted on behalf of appellant, by means of misrepresentations made to him, and by gross exaggeration, whilst the convicting Magistrate has been put to much labour and inconvenience, which he might have well been spared.

Whether or not the Constable used more constraint than was necessary, or treated appellant with unnecessary severity or not, are questions not now before me to decide; if guilty, the law is open to their accuser. Neither have I to decide upon the Magistrate's opinion, as to the credibility of the witnesses. He saw their manner of giving their evidence; their deportment, aye, and their countenances too. It was his duty and his right, to weigh the evidence, and to decide upon it. All that the Ordinance requires and empowers me to do is, to review the record of his proceedings, according to Sec. 5 of Ordinance 19 of 1856, and to try if there be any irregularity or illegality in them. I must say, however, that I coincide in opinion with the Magistrate, regarding the weight of the evidence in this case.

The question in this case is, did Robert Bruce act illegally in arresting John Fyfe, and was there any illegality on the part of the Magistrate, in sanctioning by a conviction, a false arrest?

Before I proceed to decide those points, I would remark, that the blows sworn to by appellant's witnesses, could not have been heavily dealt. The evidence of Sergeant Elliot, in charge of Fort Wellington Police Station, satisfies me that after careful examination of appellant's person, not the slightest mark of injury could be seen; that he complained of no injuries or blows, but continued to vociferate, and sing songs till 11 o'Clock. Then as to his having been dragged naked through a thoroughfare crowded with women and children, so indignantly set forth in florid language, I have only to observe, that I do not believe that the Constables tore the clothes off his back. I believe that the osnaburg trousers fell off for want of buttons, and that his shirt was torn by his own resistance and violence; that the Constables were bound to secure their prisoner, whether naked or not; that the children had no business there, and that the modest women might have turned away their heads.

And now, as regards the arrest. It was (in my opinion) lawfully made, and being of that opinion, for the foregoing and following reasons, I confirm the conviction with costs.

A complaint was made to respondent, asking his protection as a Constable, by a woman whose house he had entered, and beaten her with a stick. Another Constable went to her house and brought appellant out from her house on the public road. He did not

arrest him on that charge, as it was not in writing. Respondent Bruce then came up; he had seen the injured arm of the woman, but as he had not witnessed the assault, he advised appellant to go home, or he would get into trouble; thereupon appellant threatened thrice, the lives of respondent and the two other Constables; he was excited and drunk. Now, the law is, that if a Constable hears a man threaten the life of another; or if a man threatens the life of the Constable himself, it is his duty to arrest him.

Again, it was the duty of the Constable to advise appellant to go home; he was drunk and violent. Might he not have renewed his assault on Julia Thompson? He was uproarious, and surrounded by about 200 persons.

Again, if he was drunk and violent, respondent was bound by the printed instructions issued from the Government Secretary's Office, (and signed "By Command, William Walker, Gov. Sec.") to arrest appellant. The instructions are in these words—

"Where a drunken man or person in a violent passion, threatens "the life of another, the Constable should arrest him."

I have already remarked that the authorities extend that right to the Constable, when himself is so threatened.

Now, that appellant was drunk, is in my opinion proved. All the witnesses for the prosecution swear he was drunk, and they are corroborated by Sergeant Elliott, who convinces me that he was both drunk and violent. Not one of the witnesses produced by him swear as to sobriety or otherwise, but one, who said he was a little tipsy, for he *fell* when he ran, and another witness, his "Auntie" or his Mother, advised him to go home, as "his head was wrong."

I have been informed that the Constables were implicated in the recent Portuguese Riots; I can only say, had I known the fact, I would not have signed their precepts, except on certificates of repentant good conduct; but I think the evidence justifies their conduct in this transaction

The Schoolmaster, John Gyles, has been very active on the part of John Fyfe. He has written three long statements for him, and he has given evidence of blows, that Sergeant Elliott has satisfied me, inflicted no injury. But his evidence is totally useless in this case, for he was not present at the original arrest. If my advice to Mr. Gyles would be of any avail, I would suggest to him that it would be happier for himself, and better for his pupils, should his voice never again be heard in the streets of a village of bad repute, interfering with the Constabulary, on behalf of such a character as John Fyfe—a man whom the records of the Magistrate's Office, proves to be a frequent and cruel offender—one of the worst characters amongst many bad ones—a man who within the first six

months of this year, has been thrice convicted; namely, on the 12th January, for *abusive* and *obscene* language; 9th February, assault and battery *on his wife*, whom he beat until she fainted; 22nd June, assault and battery of Polly Garland, an old woman, his wife's Grandmother, whom he knocked down and kicked in a most savage manner, and then rolled her into the mud of the trench. I make these remarks in consequence of allusion to the witness Gyles, made in an official letter addressed by the Magistrate to the Registrar, which will be filed with the other papers, and because I feel it to be my duty to throw out any hint that might hereafter cause the Law and its Ministers to be more respected in a place, speaking of which in his evidence, the Parish Schoolmaster says, a *row* is not a thing of uncommon occurrence.

PETER Mc PHERSON, RURAL CONSTABLE *v.* JOSHUA THOMPSON AND ROBERT Mc PHERSON.

11th December, 1858.

(Ordinance 20 of 1856.)

Convicting of one offence, when defendant is tried for another.

THIS was an appeal from the decision of Mr. A. F. BAIRD, S. J. P., who tried the defendant on a charge of resisting the complainant, a Rural Constable, while in the execution of his duty. The defendant, Thompson, was discharged, but the Magistrate found the defendant, Mc Pherson, guilty of an ordinary breach of the peace, and sentenced him to pay a fine of Ten Dollars.

ALEXANDER, J., gave judgment as follows:—

Robert Mc Pherson is charged with having resisted the complainant, while in the execution of his duty, as a Rural Constable, and having assisted John Fyfe, a prisoner, to escape from his custody.

The only evidence to support this charge is, that when the prisoner, John Fyfe, was in custody, appellant said, "If the prisoner gets "away from you, nobody has any right to arrest him again."

The Magistrate then convicted him of a breach of the peace. Defendant came to meet a charge of resistance. I do not think the words sworn to, as having been used by him, sufficed to sustain the charge he came prepared to meet, or the conviction. The words were not threatening, abusive, or indecent words, and did not amount to a breach of the peace. Had he been tried for *inciting*, and convicted thereof, the case might have amounted to that offence; but a man must be tried in the case he comes prepared

to meet, and the conviction must be founded on the complaint. I therefore quash the conviction with costs.*

WILLIAM JOHN JEFFREY, INSPECTOR OF ROADS
Versus
ALEXANDER WINTER, REPRESENTATIVE OF PLANTATION *KORTBERAAD.*

20th December, 1858.

(Ordinance 30 of 1856.)

Liability of Proprietors to keep up Road.

THIS was an appeal from the decision of Mr. Mc SWINEY, S. J. P., who had fined the defendant for neglecting to keep his allotment of road at *Kortberaad*, in good order and repair.

The Registrar laid over the papers, transmitted to him, viz., notice, charge and sentence.

Mr. Winter appeared, and handed in statement in writing, of the grounds for seeking Review.

The Judge reserved this matter for the consideration of the other Judges, and directed the Registrar to transmit the papers, and requested their Honors' opinion on the consideration of the 8th and 32nd Sec. of Ordinance No. 30 of 1856, as to the words "Plantation "or Estate," and the liability (under the circumstances, stated by Mr. Winter) of the Proprietor of the unsold portion (the bulk) of the Plantation, to keep up the road.

The following opinion was signed by Arrindell, C. J., and Beete, J.—

Having read the whole of the papers in this matter, we are of opinion, that the agreement of Mr. Winter, with the purchasers of lots in front of this Estate, cannot affect the liability of the whole Estate, including the lots, to keep up the road.

Mr. Winter, may, under his agreement, compel the Proprietors of the lots to reimburse him their portions of the amount claimed by the Inspector of Roads, but the Inspector cannot be bound in any way by the agreement, between Mr. Winter and the proprietors of the lots.

ALEXANDER, J., gave judgment as follows:—

The opinion above, given by their Honors, the Chief Justice and Mr. Justice Beete, coincides with my own views of this case. I confirm the conviction with costs.

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* Note by Eds.—*In re Thompson*, 30, L J. M C., 19, and *Martin* v. *Pridgeon*, are interesting cases on this subject.

CHARLES BAKER, SUB-COMMISSARY OF TAXATION
Versus
AMELIA TAPPIN.

6th February, 1859.

(Ordinances 10 of 1851, and 19 of 1856.)

Proof of possession of Rum Shop—Setting aside Order of Acquittal.

THIS was an appeal from a decision of Mr. Mc NULTY, S. J. P. The facts appear in the judgment.

ARRINDELL, C. J., gave judgment as follows:—

I set aside the sentence of the Magistrate, for the following reasons—

I have taken time to consider this case, and after every attention in my power bestowed upon it, I cannot agree with the Magistrate by whom the sentence brought in Review has been given.

The charge against the Defendant is for selling rum contrary to the Ordinance 10 of 1851, to which the defendant pleaded "Not "Guilty."

The prosecutor Charles Baker says, "I know the accused; she "*keeps a shop in Georgetown;* she has not taken out a retail "Liquor Licence."

Charles Lawson says, "I know accused, I was in her shop on the "night before last; I called for two glasses of rum, they were "served; one was capsized; I paid for one to a young woman, but "I cannot swear to her."

John De Souza says, "I know the last witness; on the 23rd "instant in Water-street, I accompanied him to accused's house, "he called for two glasses of grog; a woman brought them; he "paid for one, he paid a woman, but I can't identify her; *I don't* "*know the owner of the shop,* but I know her name is Tappin."

Charles Lawson, re-examined says, "I don't know who owns the "shop."

Upon this evidence the defendant is acquitted, on the grounds—

1st. That the defendant was not identified.

2nd. Because the Magistrate entertained a doubt of the ownership of the house being sufficiently proved. I cannot agree with the Magistrate on either ground. I am aware that where the case rests upon the belief of a witness' credibility, the finding of any

Judge and consequently of a Magistrate, of a matter of fact, cannot be afterwards questioned; but in this case there is no discredit or disbelief of any witness, but merely that sufficient evidence has not been adduced.

I am of opinion that it was not necessary to prove that the defendant herself sold the rum. Three witnesses swear that it *was her shop or house in which the rum* was sold, and this is sufficient, no one would sell rum in a shop or house of another person without the sanction or authority of that person.

It was not necessary to prove the *ownership* of the house. The house or shop in which the rum was sold is described by two witnesses under oath, as the shop or house of the defendant. It is quite clear that she was in the possession and occupancy of that shop, and evidence of title is out of the question, as being unnecessary and uncalled for. I set aside (to use the words of the Ordinance) the sentence, but I can do no more. The Ordinance does not authorise me to give such a sentence, as in my opinion the Magistrate ought to have given; nor have I authority to order him to do any act, matter, or thing in this matter.

JOSEPH BARROW BELGRAVE *v.* CHARLES SEELEY.

26th February, 1859.

(Ordinance 20 of 1856.)

Magistrate's finding of facts is conclusive.

THIS was an appeal from an order of acquittal made by Mr. Mc NULTY, S. J. P., on a charge of abusive language, preferred by complainant. One of the complainant's witnesses swore to the language having been used, but another (a Policeman) told a different story.

ARRINDELL, C. J., gave judgment as follows:—

I confirm the sentence of the Magistrate, and condemn the appellant in the costs of Review; because, I see no reason to set aside or alter the decision of the Magistrate in this matter. It appears that he has believed a Policeman, a disinterested witness, rather than the complainant, and which he had a right to do. The finding of a matter of fact by any Judge or Magistrate, where there is not a jury, is conclusive. See Jurist, 19th July, 1856, No. 80, ng., No. or Vol. 2; page 1019. I therefore confirm the Magistrate's sentence and condemn the appellant in the costs of appeal.

JOHN D'ABRIO *v.* EDMUND HAWKER.

14th March, 1859.

(Ordinance 9 of 1846.)

Animus Furandi.

THIS was an appeal from a decision of Mr. C. A. FLEMING, S. J. P. The facts appear in the judgment.

ARRINDELL, C. J., gave judgment as follows :—

I reverse the sentence of the Magistrate in this case, for the following reasons—

The prisoner is accused of stealing, taking and carrying away, a quantity of plantain suckers, of the value of two dollars, the property of George Rainy and others; and the offence charged is within the provision of Ordinance No. 9 of 1846, Sec. 44. In fact the charge is one of felony, though not so expressly stated. I must view it as substantially a charge of felony.

To constitute a felony, the taking and carrying away must be felonious, that is, done *animo furandi*, or, as the Civil Law expresses it, *lucri causâ*. This indeed, is very definite, but larceny may correctly be defined thus: the wrongful or fraudulent taking and carrying away the personal goods of another from any place with a felonious intent to convert them to the taker's own use, and make them his property, without the consent of the owner, the word "felonious," being explained to mean, that there is no colour of right to excuse the act, and the intent being to deprive the owner, not temporarily, but permanently, of his property.

The prisoner pleads ignorance of the difference between *Sagepond* and *Peter's Hall*, and says, "I was sent by the driver, Ben Cuffy, to "dig suckers; he told me to go to the watchman of *Peter's Hall* to "shew me where to dig the suckers, on the *Sagepond* dam. The "watchman came out and pointed out the dam, and said it was "there the suckers were always dug."

This statement of the prisoner, is supported by Arthur Stubb, who says, "I am Overseer on Plantation *Peter's Hall;* the accused "was sent by my order through Ben Cuffy, to tell him to dig suckers. "Ben Cuffy sent him to *Sagepond;*" and by Ben Cuffy, who states, "that he sent the accused to *Sagepond.*" Meagre as this evidence is, it is sufficient to shew that the prisoner, in digging the suckers, was under a belief that he was digging them for his employer; that he had no *animus furandi*, and that he was not digging them

lucri causâ, for the purpose of converting them to his own use. He ought to have been acquitted.

I therefore reverse the sentence of Mr. C. A. Fleming, Stipendiary Justice of the Peace, whereby he found the accused guilty, and sentenced him to be imprisoned in the Jail of Georgetown, for thirty days, and during that time to be kept to hard labour; and order the prisoner to be released from imprisonment, unless detained for some other cause.

LEWIS GRANT TUCKER, INSPECTOR OF ROADS AND BRIDGES *v.* HARRY ROSE.

28th March 1859.

(Ordinance 30 of 1856.)

Liability of Proprietor to open up Drainage.

THIS was an appeal from a decision of Mr. C. G. H. DAVIS, S. J. P. The complainant served a notice on the defendant requiring him as representative of Plantation *Treurniet*, to open up the drainage of that estate to the sea. Such notice appears to have been founded on Section 32 of Ordinance 30 of 1856. The Magistrate in deciding the case, said, "I consider that the not keeping clear the drainage "to the sea must be an obstruction to good drainage, and the fact "of the Inspector requiring it by notice is a proof of its necessity "in his opinion. I therefore find the defendant guilty of the "offence."

ALEXANDER, J., gave judgment as follows :—

I reverse the decision of the Magistrate in this case. The Road Ordinance does not require persons to open the drainage to the sea, they must keep the water off the roads, but may effect that by any manner of drainage they please.

In a similar case of *Tucker v. Mc Watt*, heard the same day, Alexander, J., gave judgment as follows :—

I reverse the conviction in this case, because, there is nothing in the Road Ordinance requiring persons to open drains to the sea. They must keep the road in repair, free from water; but they may drain as they please, so as they keep the water off the road. I am well informed that opening drains to the sea would be attended with expenses equal to the full value of the respective properties, however, that is not my concern, and on a complaint and conviction by Magistrates on a charge of not keeping the road in the state required by Ordinance, I shall sustain the conviction. I abstain from any remark as to the conflict of evidence about the state of the road in December, the weight of evidence appears to be in favour of defendant.

COLIN SIMPSON *v.* LAMBERT DENIENWERKERK, SUB-COMPTROLLER OF RUM DUTIES, IN BERBICE.

28th March, 1859.

(Ordinance 14 of 1855.)

Permits for Removing Rum.

THIS was an appeal from the adjudication of Mr. W. J. SANDIFORD, J. P., and Mr. C. G. H. DAVIS, S. J. P., on the claim of the complainant, to two puncheons of rum, and a punt which had been seized by the defendant, in his official capacity. The whole question at issue was one of the construction of the Ordinance. The adjudication of the Bench of Justices was as follows :—

The Court after a careful consideration of the Ordinance 14, anno 1855, and the Sections 34 and 35 more particularly, are clearly of opinion, that two permits were required by the law, one to bear the rum to town, and another to carry it to its ultimate destination; and from the evidence adduced by the claimant, Colin Simpson, Esq., in support of his claim, for the restitution of the two puncheons of rum seized, also the punt, by the late Comptroller of Rum Duties, is of opinion that the claim of the said Colin Simpson, Esq., in his capacity of Attorney or Representative of one of the owners, be dismissed with costs of suit; and condemn the said rum and the said punt to be forfeited.

ALEXANDER, J., gave judgment as follows :—

I confirm the decision in this case, because, the rum was removed from the conveyance in which it was brought to New Amsterdam, before the second permit, required by Sec. 35, Ordinance 14, anno 1855, had been granted.

That Section enacts as follows :—

" No rum removed from the premises of any Licenced Distiller, " Rectifier, &c.,.&c., shall on its arrival in Georgetown or New " Amsterdam, be removed from the vessel or cart or other conveyance " in which the same may have been brought, until a permit, as " near as is material to the form G., hereunto annexed, for such " removal shall have been granted."

Section 37 enacts, that " any Rum removed contrary to the " provisions of this Ordinance, and every cart, waggon, boat, vessel, " or other conveyance, and every animal employed in such removal, " shall be forfeited; and every person concerned in the removal " thereof, shall be guilty of an offence, and shall be liable on con-

" viction, to a fine of Five Dollars for every gallon or less quantity " of Rum so removed."

Form G, I observe, is entitled thus—" Permit for shipment of " Rum." Whilst Form F required by Sec. 34, is entitled, " Permit " for removal of Rum." Section 35 requires it to be as near as is material to letter G.

According to the decisions of the Judges, forms in a Schedule cannot overrule the enactments of the statutes to which they are annexed—See Dwarris on Statutes, *Lord Denman.* " Forms are to " be merely considered as guides."

Chief Justice Tindal—" Forms have no overruling authority " against the positive enactments of the statutes."

Had the Sub-Comptroller signed the second permit forwarded to him by the Clerk (Egg) the omission complained of would have been cured. He had recourse to the rigorous application of the Ordinance and I must give its enactments the only construction which in my opinion they admit of.

The act of a Clerk in opposition to the instructions of his principal cannot affect the clear and explicit enactments of an Ordinance, and therefore I regard the evidence in this case, as well as the Comptroller's Certificate * as to the practice in Georgetown, to be solely for the consideration of His Excellency the Governor under Section 61, of Ordinance No. 14, anno 1855.

JOSEPH WHYTE *v.* JOHN BRUMELL, COMMISSARY OF TAXATION.

30th April, 1859.

(Ordinance 13 of 1851.)

Weights and Measures.

THIS was an appeal from the decision of Mr. Mc NULTY, S. J. P., who fined the appellant Twenty-four Dollars, for having in his possession on the 10th March, a certain weighing machine, found to be incorrect, and otherwise unjust.

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* *Certificate*—I hereby Certify that the practice in this Port, in respect to the landing of Rum intended to be bonded in the Colonial Bonded Warehouse, is—the Rum is brought to the Warehouse Stelling and there landed without any further Permit than the Permit marked F, issued for the removal from the Registered Store on the Plantation where the Rum was made, and which Permit is then lodged in the Warehouse.

Rum intended for shipment must be reported, and a Permit in form, marked G, obtained prior to the removal from the vessel in which it has been brought to town.

CHRISTOPHER BAGOT,
Comptroller of Rum Duties.

Demerara, 24th March, 1859.

ARRINDELL, C. J., gave judgment as follows :—

In this case, referring to Ordinance No. 13, anno 1851, Section 11, the shop, store, warehouse, stall, yard, or place mentioned, must be a shop, store, warehouse, stall, or place *wherein goods shall be exposed or kept for sale.*

The evidence does not shew that any goods were kept or exposed for sale on the premises, as they are called, in which the weighing machine was seized; and without entering into any of the other objections raised, I consider this sufficient and fatal, and therefore quash the conviction of the Magistrate, of the 14th March, 1859.

JOHN W. BRATHWAITE *v.* J. W. DUMMETT.

21st May, 1859.

(Ordinances 31 of 1846, 19 of 1856, and 18 of 1858.)

Landlord and Tenant.

Jurisdiction of two Justices in Ejectment Cases.

ON the 9th May, 1859, the complainant, in person, applied to Mr. JOHN BRUMELL, S. J. P., for a warrant of ejectment against defendant, but produced no evidence of proper notice having been served on him. The defendant appeared the same day and urged that the ordinary relations of landlord and tenant did not exist between him and complainant. The matter was adjourned to the next day for defendant to call witnesses. On the 10th May, defendant's witnesses were not in attendance, and complainant wanted to have his witnesses examined, but the Magistrate refused to hear them, and dismissed the application.

ARRINDELL, C. J., gave judgment as follows :—

I quash these proceedings for the reasons following—that is to say, Ordinance No. 31 of 1846, declares "that so soon as the term or "interest of a tenant shall have ended in any of the modes or man-"ners therein stated, it shall be lawful for the landholder of the "premises to cause the person refusing to deliver up possession, to "be served with a notice, the form of which is at the end of the "Ordinance—Schedule K."

Such notice being laid before one Justice of the Peace, he ought to associate with himself, one other Justice; before these two, the complaint in the form L, at the end of the Ordinance, ought to be brought.

The two Justices are then to proceed in the matter, and hear and determine the right of the complainant to obtain possession of the premises.

Ordinance No. 11 of 1858, Section 1, does not apply to the present case, because, the present case is not one of criminal prevention for the payment or forfeiture of money, recoverable at the instance of a private party, nor is it an action of debt or contract where the capital sum sought to be recovered, whether on balance of account or otherwise, does not exceed the sum of Twenty-four Dollars, and therefore it is not within the provision of Ordinance No. 18 of 1858, Section 2.

The jurisdiction in the present case is given by Ordinance 31 of 1846, to two Justices, and one only has no jurisdiction in such a case. As therefore the Magistrate had no jurisdiction in the case, except to associate with himself another justice, and to issue summons, and with the other to hear and determine the case, he had no right to dismiss the complaint.

JOHN THOMAS GREENSLADE, SUB-COMMISSARY OF TAXATION *v.* JOAQUIN FIGARO.

30th May, 1859.

(Ordinance 11 of 1851, 15 of 1858.)

Selling or exposing for Sale.

Reversal of Acquittal, and Order on Magistrate to Convict and Sentence.

THIS was an appeal from the decision of Mr. A. F. BAIRD, S. J. P. The defendant was charged with selling drugs without a license, and the Magistrate acquitted the defendant, on the ground that the Ordinance only spoke of exposing for sale. Both the Ordinances above mentioned, have been repealed.

ALEXANDER, J., gave judgment as follows :—

I reverse the judgment of the Magistrate in this case, with costs; and by virtue of the authority given me, by Ordinance No. 19, anno 1856, Sec. 30, order that the defendant shall be summoned before the Magistrate, who shall inflict on him a penalty; exercising whatever discretion the law allows him, as to the amount.

My reasons are—

1stly. Proof that defendant had not a licence to sell drugs, required by Ordinance 15 of 1858.

2ndly. That there is proof uncontradicted by evidence, that salts were sold by defendant's shop boy, taken from a box behind the counter.

3rdly. That the shop boy was not produced to deny the sale on oath.

4thly. That persons who sell articles requiring a licence, do not openly expose them, but sell them stealthily to customers, in whom they think they can confide.

5thly. Because, although the word sell would have sufficed in the Ordinance, yet, I cannot see how a man can sell an article without exposing it to his customers.

PETER JOHN ROHLEHR *v.* BHEEKUN.

30*th May*, 1859.

(Ordinances 19 and 20 of 1856.)

Fraudulent Possession.

THIS was an appeal from the decision of Mr. C. G. H. Davis, S. J.P. The defendant, an immigrant at *Albion*, was convicted by him, with having in his possession certain felt, used for covering boilers; the same being reasonably suspected to have been stolen, and with failing satisfactorily to account how he came by the same.

Defendant's sole reason for appeal was, that he was not satisfied.

ALEXANDER, J., gave judgment as follows :—

I confirm this conviction, with costs. The decision is not affected by any of the grounds mentioned in Sec. 5, of Ord. 19 of 1856. The account given must satisfy the Stipendiary Justice. He was not satisfied by the defendant's account of the felt, suspected to have been stolen, and found in defendant's house. There is nothing in Sec. 5, of Ord. 19 of 1856, to warrant me in quashing the conviction. Even, in a doubtful case, I would not inferfere with the Magistrate's discretion, when there is no illegality or irregularity.

T. R. GORDON, SUB-COMMISSARY OF TAXATION,

Versus

JOHN GOVIA AND OTHERS.

11*th June*, 1859.

(Ordinances 8 of 1858, and 19 of 1856.)

Keeping Rum below proof—Joining different cases together for purposes of Review.

THIS was an appeal from four decisions of Mr. D. BROADHEAD, S. J. P., who ordered Rum found in the respondents' shops, to be forfeited as being under 10 per cent. below proof, but imposed no

penalty, considering that none was inflicted by Ordinance 8 of 1858, Sections 1, 4, 5, 8 and 9.

ARRINDELL, C. J., gave judgment as follows :—

In this case the plaintiff seeks to have four cases of Review joined together, and to obtain the opinion of the Court upon the four cases. This proceeding is altogether irregular, and I therefore dismiss this Review, with condemnation of the Plaintiff in Review, in all costs.

I think it right, however, to state that the Magistrate's construction of the Ordinance is correct, and that there is no ground whatever for Review for his decision.

DONALD YOUNG, INSPECTOR OF ROADS AND BRIDGES,

Versus

ROBERT MILLER.

9th July, 1859.

(Ordinance 30 of 1856.)

Assault—Road Notice.

IN this case, the appellant was convicted by Mr. Stipendiary Justice CARBERY, of an assault on respondent. It appears that respondent (Manager of Plantation *Columbia*) ordered off the public road, two men, who were working there by appellant's orders; that appellant then came up and shoved the horse which respondent was riding, nearly into the trench. The appellant, to show that he was legally occupied on the public road there, put in a Road Notice, giving respondent ten days in which to make up the road. The Magistrate held that on the day on which the assault occurred, only nine working days had elapsed, there having been two Sundays since the date of service of the notice.

ARRINDELL, C. J., gave judgment as follows :—

I quash the conviction of Mr. Edward Carbery, S. J. P., in this matter, dated the Sixth of June, 1859, and condemn the appellant or defendant in Review, in all costs, for the following reasons :—

In this case, I think there is an error.

Firstly—The complaint is for an assault.

Secondly—The mode of reckoning the number of days of the notice, is erroneous. A notice cannot be served or made returnable upon a *dies non;* but there is no rule or principle of law that

supports such a doctrine, as, that in a notice of ten, or any greater number of days, Sundays are to be excluded.

Thirdly—The Sabbath Act is not relevant; and my declaring that it is not so in this case, will not produce any of the imaginary evil set forth in the Magistrate's explanatory letter.

Fourthly—I cannot see that the want of notice, or evidence of a notice, in such a case as this was requisite, as it appeared in evidence that the defendant was in the execution of his duty.

Fifthly—The complainant had no right to molest, or obstruct the defendant and the workmen under his charge, in the performance of a duty *primâ facie* legal.

Sixthly—The complainant having done so, the defendant had a right to remove the obstruction produced by the complainant.

Seventhly—In removing the obstruction, the defendant was not guilty of any excessive violence, and used that force only which was sufficient, and no more.

I therefore quash the conviction, with condemnation of the appellant or defendant in Review, in all costs.

CHRISTIAN BEN *v.* LINDO LODEWYCK AND MANOEL LIGHT.

22*nd August*, 1859.

(Ordinance 20 of 1856.)

Fraudulent Possession—Strict identification not necessary.

In this case the complainant shipped a barrel of pork and a package of tobacco, on board a vessel of which the defendant Light, was captain, and the defendant Lodewyck, a sailor. On the arrival of these articles at Fyrish, a considerable quantity of the contents was found missing, and on search, similar pork and tobacco was found in the possession of the defendants. The Magistrate, Mr. C. G. H. Davis, convicted the defendants, saying—

Complainant lost a certain portion of pork and tobacco, which he says were on freight by the "*Three Friends*," of which defendant Light, is captain. The pork produced, was found in the possession of defendant Lodewyck, and the tobacco in that of defendant Light; they are not charged with *stealing*, but there has been no evidence offered to prove how they came into possession of this property, and consequently, I am not satisfied as to how they came by it, as required by Sec. 2, Clause 6 of Ord. No. 20 of 1856. I therefore

find them guilty of having in their possession, property which may reasonably be suspected of being stolen or unlawfully obtained, and not accounting to the Magistrate, how they came by the same.

ALEXANDER, J., gave judgment as follows :—

I confirm the conviction of Lindo Lodewyck and Manoel Light, with costs—Clause 6 of Section 2 of Ordinance 20 anno 1856, was enacted to meet such cases as theirs—Light had complainant's goods on freight, and Lodewyck was Light's servant; complainant missed some pork and tobacco; similar pork was found in a box within a box in Lodewyck's house, and similar tobacco was found under Light's bed; they did not, as required by law, "satisfy the Magistrate how they came by same;" they might have readily done so; they did not even attempt explanation by proof; honest men under strong suspicion would have been anxious to clear their characters. The goods were not capable of strict proof of identity; if found very recently after being missed, and being incapable of strict proof of identity, defendants under the circumstances might have been convicted by a jury of larceny, unless defendants proved the contrary.—2nd Russ, on Crimes 125.

ROBERT SAMUEL *v.* MOURANT BOB.

12th September, 1859.

(Ordinances 28 of 1847, 30 of 1856—Section 42.)

Cattle crossing public road of Estate to which they belong, are not Strays.

THIS was an appeal from a decision of Mr. C. G. H. DAVIS, S. J. P. Complainant had Cattle pastured on Plantation *Industry*, East Coast of Berbice; and defendant, who was authorized in writing by the Sub-Inspector of Roads, seized three head of those cattle, while they were crossing the public road of that Estate, and impounded them. Complainant thereupon charged him with illegally impounding. (Under Ordinance 28 of 1847, Sec. 4, since repealed by 7 of 1866.) The Magistrate held that the cattle were strays, and dismissed the case. The complainant appealed on the following grounds, *inter alia.*

That he did not consider cattle crossing his public road "strays," within the meaning of the Ordinance, where there is pasture on either side; as they cannot be "strays" unless they leave the boundaries of his property.

ALEXANDER, J., gave judgment as follows :—

I reverse the dismissal of complainant's case by the Magistrate, and by virtue of the authority conferred upon me, by Section 30,

of Ordinance 19 of 1856, I order the Magistrate to summon the defendant, Mourant Bob, before him, and under Section 4, of Ord. 28 of 1847, to sentence said defendant to repay to the complainant, Robert Samuel, the full expenses of poundage, and also of returning the cattle impounded, and also, under Section 24, of Ordinance 19 of 1856, such costs as to the Magistrate may seem just and reasonable in that behalf.

There was no evidence that the cattle impounded were "strays," as defined either by Fleta or Blackstone, or Webster, or by the Common English acceptation of the word.

WILLIAM ROSS *v.* LEWIS GRANT TUCKER, INSPECTOR OF ROADS AND BRIDGES.

12th September, 1859.

(Ordinance 30 of 1856.)

Procedure.

Inspector may Summon without giving notice.

THE proceedings before the Magistrate, Mr. C. G. H. DAVIS, were as follows :—

The complainant states on oath, that on the 31st of August, a portion of defendant's road was broken away by the pressure of water on it, and that the water was then so high on each parapet, that two vehicles could not pass without going into the water, to the depth of the horses' knees. That several parties had called his attention to that road before he summoned defendant.

Defendant, for the defence, states that he made up his road according to the notice then given; he also made up his back dam, but that had given way, and that since the weather held up, he had engaged people to do the road, and the Inspector knew he had done so.

Found guilty, fined $20, and costs 76 cents, or 30 days imprisonment with hard labour.

Defendant requests a Review on the grounds, that—

1st. He received no notice.

2nd. The excessive penalty.

ALEXANDER, J., submitted the following judgment to the other Judges :—

In this case, I wish to have the opinions of their Honors, the Chief Justice, and Mr. Justice Beete, by which I shall be governed.

The question is, may the Inspector of Roads proceed to Summary Conviction, by summons, under Section 45, of Ordinance No. 30, anno 1856, against "any person neglecting to keep the road, &c., &c., "he owns or represents, in good order and repair, without first "having served the notice mentioned in Section 32 of said "Ordinance?"

Section 32. That notice, "shall point out generally the work to "be done, and shall fix the time within which it is to be done."

Section 33 imposes a fine of $2 per day, for every day the work shall remain unfinished, after the expiration of the time so fixed, unless proceedings be stayed by the Governor and Court of Policy; and the Inspector may do the work, but must have the previous sanction of the Governor and Court of Policy, where he thinks it will exceed $100.

By Section 37, the Inspector is to furnish an account of the costs of repairs, which, being approved by the Governor and Court of Policy, the amount shall be recovered by summary execution against the said Estate, at the instance, and in the name of the Receiver or Assistant Receiver-General.

This is a proceeding *in rem;* and the Receiver-General, if the movables be insufficient, or the Estate mortgaged, may sell the Estate.

So far, the above steps, founded on the notice required by Section 32, are not in the nature of proceedings in cases of Summary Convictions, by a Stipendiary Magistrate.

By Section 45, any person neglecting to keep the allotment of road for which he is liable, in good order and repair, is *Guilty of an offence,* and liable to a penalty of not exceeding $24.

By this 45th Section, certain omissions and commissions are declared to be offences punishable by penalty on Summary Conviction. These offences are enumerated, and are each separated from the other of them, by the disjunctive conjunction "Or."

The first offence created by Section 45, consists in not keeping the allotment of road for which defendant is liable, in good order and repair; (or so and so, or so and so) and the last offence, which is made the subject of Summary Conviction, is, "violating any of "the provisions of this Ordinance, for which no penalty has been "provided by any Section of this Ordinance."

I hold the first and last of these offences, created by Section 45, to be distinct and separate. The proceedings founded on the notice end in process against the Estate.

By Section 45, the proceedings are against the person.

In my opinion, an option to be governed by the circumstances of each case, is given to the Road Inspector, either to adopt the more mild proceedings, under Section 45, or to resort to the more serious

proceedings, founded on the notice of Section 32, and ending with the sale of property, in Section 39.

There may be cases where (a Summary Conviction having been had) resort to Sections, between 32 and 39, may not be necessary.

In my opinion, a summons is the only notice necessary, in cases of the Summary Jurisdiction of a Justice of the Peace; as the proceeding under Section 45, must necessarily be. At the same time, I think it would be better for the Inspector to serve a notice in every case.

The other Judges (Arrindell, C. J., and Beete, J.) having concurred, the Magistrate's decision was affirmed.*

JESSIE FRANK *v.* ANTONIO JOAQUIN DE COSTA.

23rd November, 1859.

(Ordinance 20 of 1856.)

Abusive Language—Frivolous Charges.

THE complainant and defendant had a quarrel about the price of some lard, and the defendant spoke in a rough and indecent manner to her, whereupon, he was summoned. Mr. C. G. H. DAVIS, S. J. P., dismissed the case, on the grounds that it was "too frivolous." An appeal having been made against this decision—

ALEXANDER, J., gave judgment as follows:—

I confirm the Magistrate's decision without costs. There were no refined and delicate ears but complainant's to be annoyed. Some discretion must be left with Magistrates, when dealing with frivolous cases. The words used were indecent, but provoked, and no others were present. Perhaps the Magistrate would have done well to have fined defendant in the lowest coin in circulation, but I shall not under the circumstances, disturb his discretion.

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* A similar judgment was pronounced by Alexander, J., in a case of *Greenslade v. Ross*, on the 4th February, 1860.

THERESA LONDON *v.* THOMAS DAVID.

6th February, 1860.

(Ordinance 20 of 1862—Section 47.)

Assault, where Title of Land is in dispute.

THIS was an appeal from the decision of Mr. E. CARBERY, S. J. P. Defendant was charged with an assault on the complainant, while she was picking mangoes from a tree, which defendant claimed as his property. The Magistrate convicted.

ALEXANDER, J., gave judgment as follows:—

I confirm the conviction in this case with costs. An assault in point of law was committed, even had claimant for Review, a well founded and *bonâ fide* interest.

The evidence shews he had no right, title, or interest whatsoever, and that the claim of right he set up, to oust the jurisdiction of the Magistrate, was a colourable, or rather an unfounded pretext. The authority under the English Statutes, 7 and 8, George the 4th, and 9, George 4th, Section 29, (of which Section 29, Ordinance 12 of 1846, is a verbatim copy) establish the right of the Magistrates to examine witnesses, to inform them whether the pretence of title be *bonâ fide* or not, and that they should not without such enquiry suffer their jurisdiction to be ousted.

WILLIAM HORTON *v.* ADAM CHESTER.

17th July, 1860.

(Ordinance 11 of 1851—Section 11. Since repealed by Ordinance 15 of 1861.)

Taking out Licenses—And Penalty for not doing so.

THIS was an appeal from a decision of Mr. W. HUMPHREYS, S. J. P., who dismissed a case brought by the appellant in Review, against the respondent in Review, for having used a double-barrelled gun, without having previously obtained a license.

The Commissary had given the latter permission to use his gun, until such time as the licenses could be procured from town.

BEETE, J., ruled that the Commissary could not supersede the law, and gave the following reasons :—

I set aside the decision of the Magistrate in this matter, with compensation of costs in the matter of the complaint, and in the matter of the Review.

It is quite clear that the offence charged, was committed on the 11th July, 1860. It is equally clear that Adam Chester had not a license on that day, as the license exhibited bears date the 17th July, 1860.

A Commissary of Taxation cannot supersede the Law, which, in this case, is to be found in Ordinance No 11, anno 1851, Sec. 11. The case may be a hard one, but the Magistrate's decision is contrary to law.

MELVILLE TYRELL *v.* PETER STUART.

17th July, 1860.

(Ordinance 11 of 1851—Section 11. Since repealed by Ordinance 15 of 1861.)

Taking out Licenses, and Penalty for not doing so.

THIS was an appeal from a decision of Mr. W. HUMPHREYS, S.J.P., who dismissed a case brought by the appellant in Review, against the defendant in Review, for having used a gun without previously obtaining a license for the same. The Commissary had given the latter permission to use the gun, until he could procure the licenses from town.

ARRINDELL, C. J., gave judgment as follows :—

I set aside the decision of the Magistrate in this matter, with compensation of costs, in the matter of the complaint, and in the matter of the Review.

It is quite clear, that the offence charged was committed on the 13th June, 1860. It is equally clear, that Peter Stuart had not a license on that day, as the license exhibited, bears date the 17th July, 1860.

A Commissary of Taxation cannot supersede the law, which, in this case, is to be found in Ordinance No. 11, anno 1851, Section 11. The case may be a hard one, but the Magistrate's decision is contrary to law.

PETER STUART *v.* T. P. W. HORTON.

31st July, 1860.

(Ordinance 20 of 1856—Section 1, paragraph 4.)

Firing a Gun on the Public Road.

THIS was an appeal from the decision of Mr. W. HUMPHREYS, S. J. P., who fined the appellant for firing a gun on the public road. He pleaded guilty.

ARRINDELL, C. J., held that the complaint did not charge any offence punishable by any law, and gave the following reasons :—

I quash and reverse the conviction and sentence, and condemn the defendant in Review, to pay all costs.

There are several reasons why the conviction in this matter should be quashed. The first, however, is sufficient for this purpose. It is, that the complaint does not charge any offence; the matters and things therein alleged, not amounting to an offence punishable by any law that I know. The defendant has pleaded guilty; but suppose he had been charged with drinking a glass of water, and had acknowledged that he had done so, by pleading guilty, would that empower the Magistrate to inflict a fine upon him? So in this case, as no offence was charged against him, so his pleading guilty did not constitute that an offence, which in itself, was no offence at all.

JOHN CRESSWELL HALY *v.* GEORGE CLARK.

5th November, 1860.

(Ordinance 33 of 1850—Section 1.)

Trespass.

Notice Board—Optional with Owner to arrest Trespasser or not. Construction of Statutes.

IN this case, defendant was summoned on a charge of trespass. The Magistrate, Mr. C. G. H. DAVIS, S. J. P., dismissed the case, on the grounds that the complainant had not complied with the provisions of the Ordinance, which, after defining the offence, enacts

that " every such trespasser, shall, and may be seized, and detained " by any such owner, &c., &c." The complainant appealed.

ALEXANDER, J., gave judgment as follows :—

I confirm the dismissal in this case, on the ground that complainant stated, there was no trespass board up at the time of the trespass, and no demand made on the defendant, by any one in the Manager's employment, to leave the premises.

I dissent from the Magistrate's reasons, however, for dismissing the case. The words "shall and may," are in some cases imperative, in this directory.

Imperative, where they command something to be done in aid of public justice, as to take bail. Directory, where they are affirmative and not in aid of public justice.

They are not accompanied by negative words, such as, " and any " other proceedings shall be unlawful." See Dwarris on Statutes.

In this instance, they were, in my opinion, intended to secure the apprehension of vagrants, whose names and habitations were unknown, but not to take away the privilege, in small offences, of proceeding by summons, where the name and residence of the party was known.

HENRY OLTON, OFFICER OF COLONIAL CUSTOMS v. JOHN FEREIRA AND JOSE GONSALVES.

24th November, 1860.

(Ordinance 8 of 1858—Section 7 and 10. Since repealed by Ordinance 25 of 1868.)

Having Rum in possession, under the proof as ordained by Law.

THIS was an appeal from the decision of Mr. J. D. FRASER, S. J. P. The appellants in Review, had 14 bottles of rum in their store, which rum was from 20.05 to 26.08, under proof. The Magistrate ordered the rum to be forfeited; and inflicted a penalty of $24.

This sentence was set aside by ARRINDELL, C. J., who gave judgment as follows :—

In this case, I reverse the sentence of the Magistrate, which dismisses the complaint of the plaintiff in Review, in so far as regards the infliction of a penalty. Section 10 of Ordinance 58 contains two separate and distinct parts. The first part relates to a Licensed Retail Dealer, selling by retail, rum, or other spirituous

liquors, from a cask or other package, holding less than twenty gallons. The second part declares, that "in case any such spirit "dealer shall fail to comply with this Section," "or in case any "rum or other spirituous liquor, being of a less quantity than "twenty gallons, shall be forfeited under this Ordinance; such "spirit dealer, or the owner, or person in possession of such rum, "or other spirituous liquor, so forfeited, shall be liable, in addition "to the forfeiture of such rum, or other spirituous liquor, to a "penalty of Twenty-four Dollars, to be recovered under the pro-"visions of Ordinance No. 19, of the year 1856."

The words, "or in case such rum, or other spirituous liquor, "being of a less quantity than twenty gallons, shall be forfeited "under this Ordinance," are very general and comprehensive, and do include rum seized and forfeited under the provisions of Sec. 1, of the year 1858, as was the case in respect to the fourteen bottles referred to in the complaint, as seized and forfeited, under Section 1, of No. 8, of the year 1858.

LALLEE *v.* DAVID MARTIN ROSS.

3rd December, 1860.

(Ordinance 12 of 1846.)

Assault.

Magistrate sole judge of Facts.

THIS was an appeal from the decision of Mr. C. G. H. DAVIS, S.J.P., who convicted defendant of assaulting complainant. The case was postponed four times, for further evidence, and a further postponement was requested by defendant, and refused by the Magistrate. Ordinance 12 of 1846, under which the charge was brought, was repealed by 26 of 1862.

ALEXANDER, J., gave judgment as follows:—

I confirm the Magistrate's decision in this case, with costs.

1stly. Because, in such cases, the Magistrate is substituted for a jury, and in this case, there was evidence to be left to a jury; and neither the Court of Queen's Bench, or a Judge, would set aside the inference drawn by a Magistrate, from the evidence, in the absence of malice or corruption; an insinuation of which, in this case, would be absurd.

2ndly. Because, although a Magistrate, in deciding cases of a penal nature, should give the accused the benefit of any reasonable doubt entertained by him; it is to be presumed, when he convicts,

that he had none, and that his conscience and understanding were satisfied.

3rdly. Because there is no "irregularity or illegality whatsoever" in the decision in this case.

Any one of the above reasons would suffice. With the conflict of evidence, I have not to deal. If it involved questions of inference and fact, which the Magistrate decided; but I would observe, that in my opinion, there is no conflict between the evidence of the *credible* witnesses, John Creswell Haley, and that of the complainant. Haley was told that the complainant and others had left *the buildings;* his enquiry was directed to the reason for their leaving. Mr. Haley then used encouraging language, offering protection to complainant, and she went away. It does not appear that up to that time, Haley had heard anything of what was alleged to have occurred at the cow pen; but the next witness for the defence, Wellington Ben, deposed that complainant commenced to speak to Mr. Haley about having met defendant at the cow pen, but nothing further appears to have been said about it. I merely make the remarks to satisfy the parties, that there does not appear to me to have been any conflict, except in Coolie testimony.

The request by defendant for a fifth adjournment was unreasonable, and very properly rejected.

THOMAS BISHOP DUGGIN, SUB-COMMISSARY OF TAXATION *v.* HENRY CRAWFORD.

11th February, 1861.

(Ordinance 18 of 1860—Colonial Taxes.)

Exemption from Horse Tax.

THE defendant was charged with keeping and using a horse without having taken out a license for it. His defence was, that he, as the owner of the cattle farm "Tain," and that his horse being used on that farm, was exempt. The Magistrate, Mr. C. G. H. Davis, convicted. On appeal—

ALEXANDER, J., gave judgment as follows:—

I confirm the decision in this case, with costs. Prosecutor swore that he had seen the horse in question, used by others, as well as by defendant. Appellant states that he sent the horse and waggon on the particular occasion, mentioned by prosecutor, on *his own* business, and that Mrs. Veness availed herself of the opportunity, &c., &c.; but the Ordinance requires that the horse should be used

exclusively in the service of *the Estate;* and there is no proof in this case, that he was sent on the service of the Estate, but on the contrary; and it is admitted that he was sent on appellant's *own* business, which may, or may not have been on the service of the Estate; and there is no proof that it was in such service.

A Manager, or owner of an Estate, may have business of his own, distinct from the service of the Estate.

JOHN DUNDAS, RICHARD PRIMUS, SAMPSON COLIN AND JACK BLUCHER *v.* E. V. CAUSER.

16th March, 1861.

(Ordinance 2 of 1853.)

Masters and Servants—Nature of Contracts.

THIS was an appeal from a decision of Mr. GRIFFITH, S. J. P., who had fined the appellant for refusing to do certain work, ordered by the defendant in Review.

ARBINDELL, C. J., reversed this sentence, as there was no evidence to prove on what terms the appellant in Review, undertook the work, and gave judgment as follows:—

By Ordinance No. 2 of 1853, Section 2, contracts for service may be either written or verbal; or thirdly, by Section 7, there may exist an implied contract for one calender month's service.

In the present case, it is admitted that there was no contract, written or verbal, entered into by the parties, according to the provisions of Section 2. The question then is, whether the entering into the service of the plaintiff by the defendant, was of such a nature, as to come within the provisions of Section 7?

If a man enters upon an Estate to work generally, without any contract, written or verbal, then the law steps in and says, that the time of service shall be for one calender month.

In the present case, it does not appear upon what terms the defendants undertook to work on Plantation *Enmore.* The defendants insisting that it was job work they undertook, and the complainant denying this.

There is not evidence enough on the proceedings to show which of the parties' statement is correct, and I therefore reverse the convictions of the defendants, with costs.

THOMAS SAMPLE *v.* DONALD YOUNG.

16th March, 1861.

(Ordinance 2 of 1853.)

Masters and Servants—Nature of Contracts.

THIS was an appeal from a decision of Mr. W. HUMPHREYS, S.J.P., who had ordered to be forfeited, the balance of the wages due to the appellant, in Review; and had in addition inflicted a penalty of Ten Dollars.

ARRINDELL, C. J., reversed the sentence, as he considered the contract was not proved, and that the hiring was a daily hiring. He gave judgment as follows :—

In this case, the Magistrate has sentenced the defendant to forfeit the balance of wages due, and to pay a fine of Ten Dollars, and for costs, Seventy-six Cents.

I cannot uphold this sentence, for it appears to me, that the hiring was a daily hiring, and that when the complainant said to the defendant, "if you don't wish to do the work, you can leave it," the defendant was at liberty to take the complainant at his word, and to leave the work as he did.

I therefore reverse the sentence, with condemnation of the complainant, the defendant in Review, in all costs.

J. L. HINTZEN *v.* ERASMUS SCOTT.

29th April, 1861.

(Ordinance 2 of 1853.)

Absence of Labourer from work.

IN this case, the complainant employed defendant to cut canes. In consequence of a dispute about the work, defendant left the work early in the day, and refused to return to it. His excuse was, that he had done a day's work, and the Magistrate, (Mr. E. K. Croker) accepted it as sufficient, and dismissed the case. Complainant appealed from this decision.

ALEXANDER, J., gave judgment as follows :—

I reverse the dismissal in this case, and I order the Magistrate who presided to have the defendant brought before him by due process of law, and to inflict upon him such punishment as the law directs; and as to the Magistrate, in his discretion, may appear to be meet. My reasons are—

1stly. That although the complaint would have been more correctly made under the 10th Section, of Ordinance No. 2, anno 1853, than under the 2nd Section, there is in my opinion, evidence to sustain the charge.

2ndly. By the 2nd Section, it is enacted, that any person having entered " into such service" under *any contract whatsoever*, whether the same shall be in writing, or not in writing, shall absent himself from his service, " unless for some reasonable cause; on conviction " thereof, shall be punished by fine or imprisonment, such fine, not " to exceed $24, and such imprisonment, not to exceed thirty days."

3rdly. By the 7th Section, it is enacted, that in the absence of any express agreement to the contrary, the entering of any person into the employ of any one, shall, in the case of agricultural labourers, be taken to be a lunar month, from the time of the hiring, to be terminated in the manner by that Section provided.

4thly. Because, in every contract, whether express or implied, the law implies obedience by the person employed, to the reasonable command of his employer.

5thly. Because I consider, that the word *service* throughout the Ordinance, means the daily labour or work, for the performance of which, the labourer was engaged; and that to suspend such labour, or to absent himself from his work, would be absenting himself from such service; and further, because a person may be said to absent himself from work, if, without reasonable cause, he refuses to perform the amount of daily work that the custom of the district demands. If I were to hold, that a man who worked only two hours, could not be said to have absented himself from his work, I must hold the same, if he only worked five minutes, which I am not prepared to hold.

6thly. In the absence of evidence, of the custom of the neighbourhood, which I regret, I do not find in the very meagre case that has been submitted to me, I can infer from the evidence, with moral certainty, that defendant left his work in a huff, before he had completed his day's labour; and there is no evidence, that he gave to the Manager as his reason for so doing, that he had completed the usual day's work. On the contrary, there is evidence that when the Overseer gave him, and others, a message from the Manager about the cords of canes, he *instantly* stopped work, left the cane piece, enticed the others to follow him, and disobeyed the Manager's

reasonable commands, to return and complete his day's work. Had any injustice been done to defendant, regarding the cords of canes that represented the amount of his wages, and this I shall not presume, in the absence of proof, the dispute could have been settled by the Stipendiary Justice; but I do not consider it to be a reasonable cause for absenting himself from his usual amount of labour, which the Manager swears he did not perform; on the contrary, he swears that he lost a day's work.

There is no proof that defendant weeded ten beds of canes, and nothing could have been more easily proved. We have merely his assertion of the fact before the Magistrate, but no proof that he told the Manager, that he had done a day's work, or that he left off on that account.

JOSE RODRIGUES *v.* JOHN LIOT BACKER, REVENUE OFFICER.

14th September, 1861.

(Ordinance 21 of 1861.)

Renting and Selling Crown Lands.

THIS was an appeal from Mr. PLUMMER, S. J. P., who had fined the appellant in Review, for sub-letting a grant of land, he had rented from the Crown.

ARRINDELL, C. J., considered the evidence did not bear out the charge, as there was no transfer of the land, and that the mere fact of allowing another person to cut wood and burn charcoal, for a portion of the proceeds, did not amount to sub-letting. He therefore reversed the Magistrate's sentence, on the following grounds :—

The whole of this case turns upon the question, whether the holder of a grant of Government Land, allowing a person to cut wood, and burn charcoal on his land, for a portion of the proceeds, can be considered a sub-letting of said land, or any part thereof.

It appears to me, that there has been no transfer of the grant, nor any sub-letting of the land, or any part thereof; and that the conviction of the Magistrate is wrong. I therefore reverse the same, and order the defendant in Review, to pay all costs.

ANTONIO D'OLIVERA *v.* JOHN LIOT BACKER, REVENUE OFFICER.

14th September, 1861.

(Ordinance 21 of 1861.)

Renting and Selling Crown Lands.

THIS was an appeal from a decision of Mr. PLUMMER, S. J. P., who had fined the appellant in Review, for sub-letting a grant of land he held from the Government.

The facts of the case will be found in the judgment of Arrindell, C. J., which is as follows :—

The whole of this case turns upon the question, whether the holder of a grant of Government Land, allowing a person to cut wood, and burn charcoal on his land, for a portion of the proceeds, can be considered a sub-letting of said land, or any part thereof.

It appears to me, that there has been no transfer of the grant, nor any sub-letting of the land, or any part thereof; and that the conviction of the Magistrate is wrong.

I therefore reverse the same, and order the defendant in Review, to pay all costs.

HENRY CRAWFORD *v.* GONGAH, SCHREKUSSON, BEDEPUTH, AND SAYPOO.

18th September, 1861.

(Ordinance 7 of 1854. See 9 of 1868—Section 5.)

Refusing to perform Task.

THE defendants * were indentured labourers on Plantation *Port Mourant*, of which complainant was Manager. They were summoned for having refused to perform the task allotted to them; and the question arose, as to the fairness of the rate of wages. The Magistrate, Mr. C. G. H. Davis, S. J. P., in giving his decision, said—

According to the evidence, and the statement of the defendants, they neither of them performed, on the 19th and 20th August, (the

* It is strange, that in this case, no notice was taken of the illegality of trying defendants jointly, for offences which could not be joint.

days charged) the task, which even at 16 feet per cord, should have been done; they having on those days, only accomplished 10 feet. The evidence further shows, that in the week, ending 24th August, Gongah made 64 feet—add 16 feet for day at Court—80 feet
Schrekusson.....56 „ „ 16 „ „ „ 72 „
Bedeputh.....40 „ „ 16 „ „ „ 56 „
Saypoo.....36 „ „ 16 „ „ „ 52 „
consequently, Gongah having done equal to five tasks, at 16 feet, the case against him, is dismissed. The other three, not having performed five tasks, even upon their own scale, are found guilty, and fined, each 24 cents, or two days hard labour.

In delivering this decision, I am bound to observe, that the task 20 feet, as required by complainant, for 32 cents, is excessive; the neighbouring Estate, *Albion*, requires only 16 feet; and no other Estate in the district, (or in the Colony, as far as I know) gives such a task, as 20 feet, for 32 cents. In Canje, 16 feet constitute the task; and it is within my personal knowledge, that some Estates are paying to Coolies and Creoles, 48 cents for the 16 feet, making just within four cents, the same amount for *one* task, which complainant would give for *two*.

The complainant has produced no Creole labourer as a witness to sustain his case; and of the parties, who, according to his evidence, perform the 20 feet for 32 cents; all are Africans, except Eve Tom, a female, whose isolated case cannot establish a rule, which is only deducible from the practice of the Creole labourers of the *Colony*, and not from any particular person or Estate.

From what has been elicited, I am convinced, that the task of 20 feet, is of greater " extent than that assigned for the same rate " of wages, as a daily task to the Creole labourers of the Colony." See Section 33, of Ordinance 7 of 1854; consequently, in the present state of the labour market, it cannot be legally enforced. Considering that complainant, by his excessive requirements in this instance, has given very great provocation to the defendants, I cannot allow costs of suit in either of the cases. On appeal—

ALEXANDER, J., having read the papers, gave judgment as follows:—

I dismiss this Review, with costs.

OUDHIN *v.* HENRY CRAWFORD.

4th November, 1861.

(Ordinance 7 of 1854. See Ordinance 9 of 1868.)

Rate of Wages.

THE plaintiff, an indentured immigrant at *Port Mourant*, sued the defendant, Manager of that Estate, for wages. It appeared that he had been employed cutting canes, at 24 cents, for a 16 feet cord. Evidence was adduced, to show that on other Estates, 32 cents was given for such a task. Mr. C. G. H. Davis, S. J. P., decided against the Manager, remarking on the fact, that in a similar case on the same Estate, (*Crawford* v. *Gongah and others*) the Review Court had upheld his decision. The defendant appealed from the Magistrate's decision.

ALEXANDER, J., gave judgment as follows :—

I reverse the decision of the Magistrate, for the following reasons—

1stly. The defendant in Review, is bound by indenture or contract, (given in evidence) "to work for the same rate of wages as is paid "to the labourers not under indenture or contract, working on "said Estate."

2ndly. There is evidence, that the unindentured Creole labourers, living on the Estate, have, for some weeks, been paid 24 cents for a cord of canes, of 16 feet; and I do not consider the non-resident, unindentured labourers, who have neither houses, nor medical care, and who have no perquisites, to be the unindentured labourers, contemplated by the Ordinance.

3rdly. The interpretation clause, makes "indenture" and "con- "tract," convertable terms; if no such rule of construction had been enacted, I would hold them to be so, to avoid an absurdity, which would otherwise obviously arise from any other ruling.

The form of the indenture, and the terms of the contract therein specified, are enacted by the 16th Section, between which form of indenture or contract, and the 33rd Section of the Ordinance, I do not perceive the variance suggested by the Magistrate; nor is this a like case to that of *Gongah*, (Coolie) to which, in his remarks, he refers. The Manager (appellant, in that, as in this case) sought to punish *Gongah* for not having performed a sufficient number of tasks, of cutting cords of canes of 20 feet. That was a *penal prosecution*, under the 33rd Section, which has no reference to the indenture or contract evidence, and regulated by the Schedule. In *Gongah's* case, I held that the words, "as, and assigned to the

"Creole labourers of the *Colony*," in the concluing lines of the 33rd Section, let in evidence, of the extent of tasks assigned to the Creole labourers on other large, well-cultivated Estates in the district. The proceedings against *Gongah*, were penal, the present case is in the nature of a civil action of debt for wages, arising out of a written indenture or contract, by which the parties to it are materially bound.

D. W. LILLIE, INSPECTOR OF POLICE *v.* JOHN MELVILLE.

19th May, 1862.

(Ordinance 22 of 1861.)

Sale of Opium, by Licensed Druggist.

THIS was an appeal from a decision of Mr. E. CARBERY, S. J. P., who convicted defendant, and fined him Twenty-four Dollars, for selling an ounce of Laudanum to a Policeman.

ALEXANDER, J., gave judgment as follows:—

I reverse the decision of the Magistrate in this case, for the following reasons—

1st. Because, I am of opinion, that by the 2nd Sec., of Ord. No. 22, anno 1861, it is clear that a Licensed Druggist, may sell and deliver to any person, any Bang or any Opium, provided that it be *bonâ fide* compounded as a medicine.

2nd. Because, the evidence given on the part of the respondent, satisfies me, that the Laudanum sold by him to Farley, was *bonâ fide* compounded as a medicine, and sold as such.

3rd. Because, in my opinion, the 3rd and following Sections do not apply to a Licensed Druggist, who requires no separate license to deal in Opium.

4th. Because, by the 17th Section, and the 28th Section, Opium or Bang *bonâ fide* required for medicinal purposes, may be sold by a Licensed Druggist.

5th. Because, the 2nd Section of the Ordinance does not restrict a Licensed Druggist to the sale of 5 grains of Opium, within 24 hours, as it does restrict a dealer in Opium.

6th. Because, although a preamble has no power to control the enacting clauses of on Ordinance; and the enacting clauses may extend the penalty to other persons than those to whom it is intended to apply, yet, if the words are not clear, the preamble may be taken into consideration, as the first step in the construction of an Ordinance.

Lastly. I cannot believe, that it was the intention of the Legislature, to require persons living many hours distance from a Licensed Druggist's establishment, perhaps a day's distance, to send every 24 hours, for a quantity of Laudanum, merely containing 5 grains, especially, as that licensed drug, is a specific anodyne in many painful affections.

ORMOND FRANK *v.* CHRISTIAN MACK.

28*th July*, 1862.

(Ordinance 2 of 1853.)

Discharge of Servant without notice—Misbehaviour of Servants.

In this case, the defendant had employed the complainant as a carpenter. Complainant repeatedly came late to work, and was repeatedly warned to be punctual. Finding that he did not improve, the defendant discharged him. Complainant then charged defendant with having discharged him, without the notice to which he was entitled by Ordinance. The Magistrate, Mr. C. G. H. Davis, S. J. P., convicted defendant, saying, that he had not sufficient grounds for discharging complainant. On appeal—

Alexander, J., gave judgment as follows :—

I reverse the decision of the Magistrate in this case, because—

Firstly—It appears from the testimony of the complainant below, respondent in Review, that when he went to the buildings, on the 30th of June, to work, on being told by Mr. Mc Kinnon, the carpenters' foreman, that it was a little late, and he could make half-a-day, complainant said that he would rather go home, because Mc Kinnon said that it was late; and when he returned, on the 1st of July, he was told by Mc Kinnon, that the Manager had ordered his dismissal.

Secondly—Because, it appears from the statement of the defendant, and the witness Mc Kinnon, that complainant had been repeatedly warned, notwithstanding which, he generally came late to work.

Thirdly—Because, the promise of a servant, to obey the lawful and reasonable orders of his master, within the scope of the services contracted for, is implied by law, and if the servant be guilty of habitual neglect thereof, he may be discharged, without warning, before the expiration of the period, for which he is hired; and he is not entitled to any wages from the day he is so discharged, if they had not then accrued due. (Chitty on contracts, pages 506, 509.) Ordinance 2, 1853, Section 11.

Fourthly—Because, it cannot be inferred from the terms in which the Magistrate has written his decision, that he entertained any doubt as to the fact, that complainant was in the habit of coming late to his work; for he suggests, that the Manager should have brought him up as an offender, under the last Clause of Section 11, of Ordinance No. 2, 1853, which merely provides, that by discharging a servant for wilful omission, the employer is not *precluded* from prosecuting him for any offence committed during the service; and further, that complainant's day's work might have been made up by extra hours. Yet complainant refused to work half-a-day, because Mc Kinnon said it was too late; which reply, in my opinion, betrayed a refractory spirit.

Fifthly—Because, I consider that a servant, generally coming late to his work, after repeated warning, without lawful excuse, of which there is no proof, is guilty of disobedience to the lawful and reasonable orders of his master, which, in my opinion, amounts to omission, and neglect of duty. For these reasons, I consider that the appellant had good and sufficient cause, for dismissing the respondent.

N. J. DARRELL *v.* STEWART F. GARDNER.

20th October, 1862.

(Ordinance 9 of 1862—Since lapsed.)

Disposing of Cargo without a License.

THIS was an appeal from a decision of Mr. BRUMELL, S. J. P. It appears, that the defendant in Review, had disposed of a portion of the cargo of the Schooner *Garibaldi*, without having a license to do so, as required by Ordinance 9 of 1862, since repealed.

The Magistrate dismissed the case, but this decision was reversed by Beete, J., who gave the following reasons:—

In this case, the defendant, the master of Schooner *Garibaldi*, was charged with having, on the 20th October, 1862, in Georgetown, sold, or disposed of the cargo of the said vessel, without having a license to do so, as required by Section 13, Ordinance No. 9 of 1862.

The 13th Section of the Tax Ordinance, No. 9 of 1862 is as follows:—"Every master, or super-cargo of a vessel, or other person "on board, arriving in this Colony, having goods for sale, not "consigned to some person, holding a store or shop license, shall be "bound to report such goods at the Custom House, and to take out "a shop license for each voyage; and to pay for the same the sum "of Twenty Dollars."

It appears from the evidence, that the *Garibaldi* arrived here on the 20th October, with a cargo, consisting of lumber and other merchandize. Before consigning his vessel to some person having a store or shop license, the defendant sold the lumber to Mr. John Jones, Jnr. He subsequently consigned his vessel to Mr. Jones, who disposed of the rest of the cargo for him.

I think it quite clear, that the defendant was bound to take out the license required by law, before selling any part of his cargo; and that the offence charged was complete immediately on the sale of the lumber. If it were competent to the master of a vessel, to act as the defendant has done, in the present instance, there is nothing to prevent his retailing his cargo of lumber, or other goods, and thus enjoying an undue advantage over the local merchants.

I can see no ambiguity in the wording of the Clause in question. The complainant in this case, had an undoubted right to bring the decision of the Magistrate in Review, not only according to Ordinance 19 of 1856, but by the express provision in Section 22 of Ordinance 15 of 1861.

H. J. BLAND *v* THOMAS SNELLING.

28th October, 1862.

(Ordinance 11 of 1862—Section 10. Since lapsed.)

Fire Brigade.

THIS was an appeal from a decision of Mr. BRUMELL, S. J. P. It appeared that the defendant in Review, had neglected to pay his third instalment of commutation in lieu of service, in the Georgetown Fire Brigade.

The Magistrate dismissed the case, but BEETE, J., held that neither the Magistrate, or Court adjudicating on the case, had any discretion in the matter, under the terms of the Section of this Ordinance; he had therefore no alternative, but to reverse the Magistrate's sentence, and gave judgment as follows:—

In this case, it does not appear that the defendant ever disputed his liability to pay, or that he, in any way, questioned the legality of the ballot at which he was drawn for service; but on the contrary, he elected to commute his service in terms of the 10th Section, of Ordinance No. 11, anno 1860, paid two instalments; and would have paid the third, but for the reasons assigned by him in open Court, viz., absence from town, and shortness of work.

It would not have been competent to the defendant, to question the legality of the ballot, had he been disposed to do so.

I do not feel called upon, to express any opinion, as to the legality, or illegality of the mode in which the Town Council have worked the Ordinance, establishing a fire Brigade.

The question, as to the legality of the operation of that Body, in respect to the ballot, or the hiring of men in the room of those who commute their services, might be properly raised, by an application to the Supreme Court of Civil Justice, for a mandamus, ordering the Town Council to carry out the provisions of the Ordinance in any matter, in regard to which the party applying, may consider that they have failed in their duty; and such an application might be made by any individual personally interested, or who sustains, or might sustain, damage by the non-performance of the duty, or Act sought to be enforced.

The Section of the Ordinance under which the charge was brought, leaves no discretion to the Magistrate, or Court adjudicating upon the case; and I have, therefore, no alternative but to impose the full penalty, $24, and in addition, order the immediate enrollment of the defendant, in the Fire Brigade.

JOHN C. CLARKE *v.* THOMAS GREY.

3rd November, 1862.

(Ordinance 33 of 1850.)

On the Law of Trespass.

THIS was an appeal from a decision of Mr. DONALD YOUNG, Acting S. J. P., who acquitted the defendant in Review, of a charge of wilful trespass, brought against him by the appellant.

BEETE, J., reversed this decision, and condemned the defendant in Review, to pay a penalty of Four Dollars on the manifest misapplication of the law, to the facts proved in evidence by the Magistrate. The judgment is as follows:—

The charge against the defendant in this case, is for trespassing on the lands of Plantation *Affiance;* and the evidence for the prosecution, fully establishes the fact, that he did so; sufficiently to bring him within the scope of the provisions of the 1st Section, of Ordinance No. 33 of 1850.

The Magistrate throughout the whole proceedings, takes it for granted, that the trespass was charged as having been committed

on the beach; but this is not the case. The complainant swears that he saw the defendant coming from the water-side, opposite Mr. Daly's house. The road on which he was walking, was not the beach, but a road belonging to the Estate, leading to a koker, and he had no business there.

The 5th Section, on which so much stress is laid in the Magistrate's reasons for his decision, does not apply to the present case. It applies to parties tespassing on land, between high and low water marks; whether covered by water, or not, and there destroying, ensnaring, catching, or taking any fish, crabs, &c.

In order to convict such offenders, a notice must be stuck up on, or near to the land in question, in terms of the Ordinance. I can take no notice of the personal knowledge of the Magistrate, of the locality, imported by him, into his reasons; nor of the motives attributed, rather irregularly, by him to the complainant.

My reversal of the decision of the Magistrate, is based on his manifest misapplication of the law, to the facts proved in evidence.

JAMES DUBLIN *v.* WILLIAM GRAY.

29th November, 1862.

(Ordinance 2 of 1853.)

Masters and Servants—Nature of Contracts.

THIS was an appeal against a decision of Mr. WARE, S. J. P., who had ordered the forfeiture of the appellant's (in Review) wages, $4 80, for not finishing certain work in a field. There did not appear in the evidence sufficient proof, to show any contract or understanding between the appellant and respondent, that this work was to be finished.

The facts of the case will more fully appear in the jollowing judgment of L. SMITH, C. J., who reversed the Magistrate's decision:—

In this case, the applicant for Review, James Dublin and three others were convicted by W. H. Ware, Esq., Stipendiary Magistrate; for that they did, "during the week ending 25th October, 1862, neglect "to perform their stipulated labour at Plantation *Montrose*, when "under the obligations of a verbal contract, to one William Gray, "contrary to the 2nd Section, of Ordinance No. 2, 1853;" and the said Magistrate, thereby adjudged the said parties, for the said offence, to forfeit the "respective sums of money, worked for by "them, during the above week, to be paid and applied according to

" law, and also to pay to the said William Gray, the sum of Seventy-
" six Cents each, for costs in this behalf."

Mr. Ware's reasons are as follows—" I am of opinion in this case,
" that as the evidence discloses the fact that, the understanding was,
" that the defendants were to finish the field before they got paid;
" and as they did not do so, and refused to go back and complete it,
" it was a breach of their agreement; but looking at the fact that
" the arrangement they made, appears to me, an unsatisfactory one,
" as it entailed the necessity of the industrious man, making up for
" the less work of the idle one. I, therefore, think that an abate-
" ment of the amount they worked for will be a sufficient punish-
" ment for the breach of their agreement; and the complainant is,
" therefore, ordered to retain the amount due each defendant, for
" the work done by him."

I am unable to concur in this decision. I readily concede, that in a conflict of testimony, the Magistrate is the proper judge of the weight of the evidence, and the credit due to the witnesses examined before him; but the true test in cases of Summary Conviction, appears to me, to be, whether on the face of the papers there is sufficient evidence to go to a jury, if the conviction had been by the verdict of a jury, instead of by the decision of a Magistrate. Now, in the case before me, there is no evidence that the so called " understanding," ever was assented to by any of the defendants, or that it formed part of their contract. The applicant for Review, James Dublin, was one of twenty six persons, who, on Tuesday, the 21st October last, were hired by the Foreman of Plantation *Montrose*, acting under the orders of Mr. Gray, the Manager, to cut a field of canes on that Estate; and it is not disputed that at the end of the week he had completed all the openings that he took, amounting to six, for which he had earned $4 80. It is said, however, the *understanding* was, that the entire field was to be finished, before any of the parties were to be paid for their work; but the only foundation for this, that I can find, is, that it was the rule of the Estate. It is quite clear, that a loose statement of this sort, without any proof, that James Dublin knew of such a rule, or agreed to it, is no evidence to bind him to an arrangement, which in the words of the Magistrate, " entailed the " necessity of the industrious man making up for the less work of " the idle one;" even supposing it to have been in other respects unobjectionable.

It only remains for me further to notice, that the conviction is essentially defective; as containing no sentence, or award of punishment, under the Section of the Ordinance, which the defendant was declared to have contravened. If he was guilty of a breach of contract, as adjudged, in the first part of the conviction, the Magistrate was bound to award either fine or imprisonment, and he

had no authority, simply to order that the wages should be forfeited; had this been a mere defect in form, it would not be material, but it is an error, which renders the conviction bad.

For the foregoing reasons, I reverse the Magistrate's decision, and quash the conviction.

FRANCIS GOMES *v.* JOHN LIOT BACKER, REVENUE OFFICER.

5th March, 1863.

(Ordinance 14 of 1861.)

Renting and Selling Crown Lands.

THIS was an appeal from a decision of Mr. BROADHEAD, S. J. P., who fined the appellant in Review, Forty-eight Dollars, and ordered the forfeiture of charcoal, yarry-yarry sticks, &c., for cutting timber on ungranted Crown Lands. The question of title to said lands arose, and on those grounds, the Magistrate had no jurisdiction. The conviction was also bad in form and substance. The facts appear in the judgment.

SMITH, C. J., gave judgment as follows :—

In this case, the applicant for Review, Francis Gomes, was charged by Mr. John L. Backer, Revenue Officer of the Demerary river, with " cutting wallaba timber, on ungranted Crown Lands, in the " Houraroonie Creek, Demerary river, and converting the same into " charcoal, contrary to the 40th Section, of Ordinance 14 of 1861," and was convicted by the Stipendiary Magistrate of the district, D. Broadhead, Esq.; the minute thereof being as follows—" Sentence " to pay a fine of $48 and costs, or to be imprisoned for one month; " and if a grant holder, license to be forfeited, coals &c., to be " sold."

With respect to this sentence, I have to notice in the first place, that in awarding punishment, it is essential that it be certain and determinate; upon this principle, in England, a conviction condemning the defendant to pay £15, together with the charges, previous to, and attending the conviction, without specifying the amount, was quashed for uncertainty, and the commitment upon it discharged; so, also, a conviction adjudging, that the defendant had forfeited so much for penalties, " together with the reasonable " charges of recovering the same," was set aside as defective, in not ascertaining the exact sum; and under the old Vagrant Act, which

empowered the Magistrate to order an incorrigible rogue to be employed, after his imprisonment, in His Majesty's service, either by sea or land; a conviction ordering the defendant, after his imprisonment, "to be sent and employed in His Majesty's service," without determining whether by sea or land, was deemed wholly invalid. (See cases collected in Paley on convictions, p. 227, et seq.) To apply this principle here, there is nothing to show whether Gomes is the holder of a license, or not; no evidence was taken on the point, and the adjudication, "*if* a grant holder, license to be "forfeited," is altogether irregular.

The conclusion of the sentence, namely, "coals &c., to be sold," is open to still more serious objection. Mr. Backer, in his evidence, states that he seized "41 pits containing coals, and a lot of yarry-"yarry sticks, and a bateau with coals, and the banabo, erected on "the lands;" and I presume that these yarry-yarry sticks, bateau and banabo, are intended to be included within the comprehensive *et cetara* of the order; but it is important that it should be known, that in adjudicating upon a complaint against a trespasser on Crown Lands, under Section 40, of Ordinance 14 of 1861, the Magistrate has no power to add to his conviction, an order for the sale of the articles seized. The two proceedings are totally distinct; the one is in *personam*, and the offender is liable on conviction to personal punishment, by fine or imprisonment, or both; the other is in *rem*, and the Ordinance directs the articles seized, to be publicly advertised for two successive weeks, in the *Official Gazette*, at the expiration of which time, the Superintendent is to sell them, unless a claim be made in the meanwhile in due form, in which case he is to adjudicate thereon, in the manner pointed out. What the Magistrate should have done therefore, would have been to advertise the articles for sale, as soon as the seizure was reported to him, and then to have determined in due course of law, any claim that might have been put in. As it is, the effect of the order is, to direct property to be sold without giving parties interested an opportunity of being heard. I have thought it right to make these remarks with reference to the conviction, because I have reason to believe, that some misapprehension exists on the subject; and it may be useful to point out the right course of procedure.

Adverting now, to the evidence taken, I am of opinion, that there is nothing to support the conviction. The Magistrate appears to have acted upon the assumption, that the lands must be taken to be Crown Lands, unless the defendant could shew the contrary. Mr. Backer offers no proof to sustain his charge against the defendant for trespassing upon "*ungranted Crown Lands*, in the Houraroonie "Creek," and all that he can say is this—"I believe those lands to "be Crown Lands, because I do not see them laid down upon "Berchyck's Chart, and from the information I have received, not

"from any knowledge of my own." The Chart does not appear to have been produced, nor, is it shewn how it could be considered evidence in this case; having been made, as I believe, more than a century ago. The only other witnesses called in support of the complaint, were Mr. Wight, who proved nothing, and Mr. Chalmers, who gave no evidence at all. On the other hand, it was established on the part of the defendant, that the lands in question had been in the possession of private parties, and had been worked as private property, as far back as the year 1834, and that the defendant hired the lands from the person who claimed them, through the previous possessors. Under these circumstances, I am clearly of opinion that the Magistaate had no jurisdiction. If the lands are Crown Lands, proper steps must first be taken to resume possession on behalf of the Crown by process, if need be, before the Supreme Court; and the Magistrate is expressly prohibited by the Ordinance from entertaining any claim to possession, if it shall appear to him that the party against whom the order is sought, has been by himself, or by those under whom he claims title, in the quiet and *bonâ fide* possession of the land for one year; or that such party has any probable claim, or pretence of lawful title to such land, or to the occupation thereof. The Magistrate could not make any order on Gomes to give up possession of the land as Crown Land, and *a fortiori*, he cannot convict him as a trespasser.

I therefore reverse the decision in this case. and quash the conviction.

With respect to the articles seized, I have carefully considered what course I should pursue as regards them; and seeing that they have been improperly seized, and illegally dealt with; and no good object can, by any possibility, be attained by their being now advertised for sale; the only effect of which would be to put the defendant to needless expense and delay, I think justice demands that they should be restored. I conceive that I have full power to make the order, within the spirit and meaning of Section 48, of Ordinance 14 of 1861, and the Review Clauses, of Ordinance 19 of 1856; and I therefore order that possession of all the articles seized, namely, the charcoal, the yarry-yarry sticks, the bateau and the banabo, be forthwith restored to the applicant for Review, Francis Gomes.

HENRY GRIFFIN *v.* JAMES CROSBY, IMMIGRATION AGENT-GENERAL.

2nd May, 1863.

(Under the Immigration Ordinances, all of which are repealed by Ordinance 4 of 1864, and Ordinance 9 of 1868.)

Immigration—Cancelling of Indenture.

THIS was an appeal from a decision of Mr. WARE, S. J. P. It appeared that the appellant in Review, and an indentured Chinese immigrant, Soo-a-Chat, had by mutual consent, cancelled the indenture. The Chinese went to the Immigration Agent, defendant in Review, to get his free ticket. The latter refused to give it him, and sent him back to the Estate, in charge of a policeman. The appellant refused to take the immigrant back. Hence the action by the defendant in Review.

The Magistrate fined the appellant Fifty Dollars, which sentence was set aside by SMITH, C. J., who gave judgment as follows :—

This was a case of complaint, preferred by James Crosby, Esq., Acting Immigration Agent-General, on behalf of a Chinese Immigrant named Soo-a-Chat, against Mr. Henry Griffin, the Manager of Plantation *Industry*, to which the immigrant had been indentured, for that "he, the said Henry Griffin, to wit; on Friday the 10th "day of April, in the year 1863, at the said *Industry* Estate, as "such employer as aforesaid, did then and there ill-use the said "Soo-a-Chat; the said Soo-a-Chat then and there being such "immigrant as aforesaid, by refusing to provide him, the said "Soo-a-Chat with house, garden ground, and medical attendance, "contrary to the articles of agreement, of the said Soo-a-Chat, and "the Ordinance in such case made and provided."

From the facts proved in evidence, it appears that Soo-a-Chat was indentured to Plantation *Industry* on the 20th August, 1862, and that on the 6th April, 1863, he agreed with Mr. Griffin, on behalf of the Proprietors of the Estate, to terminate his contract. He was then in hospital with a sore foot, but was told by the defendant not to leave until he was quite well. He went away from the hospital on the Thursday night, and on the following morning, came down to the Immigration Office in Georgetown, "for "a free ticket," as he states. Mr. Crosby being of opinion that the immigrant was to be considered as still under indenture to Plantation *Industry*, ordered him to be taken back in custody to the Estate; and the sequel is thus detailed by the Police Constable

Richards—" On the 10th April, I received a Chineseman named " Soo-a-Chat, with a paper writing, with directions to convey the " man to the *Industry* Estate. As I was going to the defendant's " residence, I met him on the public road of the Estate, and told " him I had a Chinese for the Estate, shewing him the man, and I " also shewed him the paper, which he read; and he said he would " not take him back, as the man was free, and that I was to take " him away, which I did, and brought him and the paper back to " the Sergeant, John Hewitt."

Upon this, a complaint was laid by the Immigration Agent-General against the Manager, under the 28th Section, of Ordinance No. 7 of 1854, which enacts that if any employer shall ill-use any immigrant, he shall be liable on conviction to a penalty not exceeding Fifty Dollars; and the Magistrate considering the charge proved, convicted him in the maximum amount.

Mr. Ware's reasons are as follows—" I am of opinion that the " defendant in this case acted illegally, by cancelling the indenture " of the Chinese Immigrant, Soo-a-Chat, as no Immigration Ordi- " nance, that I am aware of, gave him this power which appears to " be vested in the Immigration Agent-General, on commutation " money being paid; or in the Governor, in case of ill-treatment, " and that consequently, on the 10th April, 1863, this immigrant " was, to all intents and purposes, an indentured labourer of " Plantation *Industry*, and thereby entitled to hospital accommoda- " tion and medical attendance. That by the defendant's refusing " on the said 10th April, 1863, to receive back on the said Estate " *Industry*, the said Chinese Immigrant, Soo-a-Chat, constitutes, I " consider, a case of ill-usage, coming within the scope of the 28th " Section, of Ordinance 7 of 1854."

I do not concur in this decision. There is, in my opinion, no evidence of ill-usage within the meaning of the Section under which the charge was laid. The immigrant whom Mr. Griffin is convicted of ill-using, not only makes no complaint himself, but is a consenting party to the termination of the contract. He states in his own evidence—" I admit that I signed the document here " exhibited by the defendant, and that I fully understood the " meaning of it." Such document being as follows—" I hereby " agree and bind myself to forfeit all claim to the Proprietors or " Representatives of Plantation *Industry*, for the unexpired term " of my indenture to said Estate, having obtained a release for the " said unexpired term."

There is no imputation on Mr. Griffin of fraud, unfairness, or misrepresentation; and it seems to me that the principle *volenti non fet injuria* clearly applies. It does not even appear that the immigrant was a free agent in seeking to return to the Estate, for he was allowed no option in the matter by the Immigration Agent-

General, being sent back in the custody of the police, and under these circumstances to convict an employer of ill-usage for simply refusing to take back an immigrant, who had voluntarily put an end to his contract, would, I think, be straining the law.

Upon the general question, I am of opinion that there is nothing to prevent an immigrant's contract of service being determined, like any other contract of service, by mutual consent; provided such consent be fully and unmistakeably given upon a sufficient knowledge of all the facts. Looking to the difference in the scale of intelligence between the employer and the immigrant, it might perhaps, be desirable, for the purpose of guarding against imposition, in some cases, that no indenture should be cancelled, except in the presence of a person in authority; but that is a matter for the Legislature, and not for me to determine. It is admitted that there is no positive prohibition on the point, in any of the Immigration Ordinances, and with respect to the position that an indenture can only be cancelled by the Immigration Agent-General, on commutation being paid, or by the Governor in case of ill-treatment, I have to observe, that there are cases in which the contract is determined *without* the consent of the employer, and that they do not at all affect the present question. The payment of commutation is not a protection to the immigrant, but to the employer; and it is more for the interest of the former to be freed from his obligation of service by the gratuitous consent of his employer, than against such consent by a money payment. It is not disputed that, on the 21st of August next, Soo-a-Chat would be entitled to terminate his indenture, by paying commutation, and the fact of his being allowed to do the same thing now without paying anything, cannot put him in a worse position. But it is contended that there is a third party concerned, namely, the Colony, and that if an indenture were allowed to be cancelled in this way, the immigrant might become, at some future time, a burden upon the Eleemosynary Institutions of the Country. It is clear, however, that the same argument applies to indentures cancelled by the payment of commutation, and the question is not whether the Colony *may* sustain a future injury by the determination of the contract by mutual consent, but whether there is anything in the existing law to render such a proceeding illegal, and I am of opinion there is not.

I therefore reverse the decision, and quash the conviction.

NANCY DAVID *v.* FRANCIS DE SILVA.

18th May, 1863.

(Ordinance 22 of 1862.)

Larceny.

THIS was an appeal from a decision of Mr. FRASER, S. J. P., who had fined the appellant in Review for larceny of plantains. The evidence went to show that the appellant had a color of right to the land in question, from which she had taken the plantains, in presence of the defendant in Review. The charge of larceny could not therefore be sustained, and the sentence of the Magistrate was reversed.

SMITH, C. J., gave judgment as follows :—

In this case, the applicant for Review, Nancy David, was charged by the complainant, Francis De Silva, with stealing three bunches of plantains and nineteen roots of cassava, his property. The evidence in support of the charge was, that the defendant cut the plantains and dug the cassava from the ground in question, openly in the presence of the complainant and the Ranger of the Estate; and in her defence, she claimed to be legally in possession of the land, and complained that she had been illegally dispossessed.

Whether the act of the defendant amounted to a trespass, of which the Magistrate could take cognizance, is a question beside the present enquiry; but it was clearly no larceny. To constitute the crime of theft, the taking and conveying away must be *animo furandi*, that is to say, there must be no color of right to excuse the act. "If," says Lord Hale, "under color of arrear of rent, "although none be actually due, I distrain or seize my tenant's "cattle, this may be a trespass, but is no felony. If I take an "estray upon a claim of right to it, as Lord of the Manor, it is no "felony however groundless my claim may be." (1 Hale, 509.) In the present case the circumstances negative any presumption of criminal intent on the part of the defendant, and shew that the defendant did the act complained of in the assertion of an obliged right. That right may be well, or ill-founded, but in either case the defendant cannot be convicted of larceny, for asserting it. I therefore reverse the Magistrate's decision, and quash the conviction.

BRYCE GEMMEL *v.* ALEXANDER BENJAMIN.

14th July, 1863.

(Ordinance 2 of 1853.)

Masters and Servants—Nature of Contracts.

THIS was an appeal from a decision of Mr. CHIGNARD, S. J. P. It appeared that the defendant in Review had commenced on certain work, and had refused to finish it.

The Magistrate dismissed the case from want of contract, but BEETE, J., held, that having once commenced his work, the existence of a contract was established. He gave judgment as follows:—

Having heard Mr. Gilbert, for the plaintiff in Review, and Mr. Bent for the Defendant in Review; I hereby quash the decision of the Magistrate, for the following reasons:—

I consider the interpretation put by him upon the 2nd Section, of Ordinance No. 2 of 1853, erroneous; where the service to be performed under any contract has been commenced, there is no necessity to show that such contract was in writing, or made before two witnesses, and the evidence of Mr. Gemmel, which is uncontradicted by the other witnesses, is sufficient to establish the existence of a contract in this case, and also the breach thereof by the defendant.

THOMAS BISHOP DUGGIN, REVENUE OFFICER, *v.* JOHN DE MENDONCA.

17th July, 1863.

(Ordinance 14 of 1861.)

Sub-letting Woodcutting License—Framing Charge.

THE defendant was charged before Mr. E. W. K. CROCKER, Superintendent of Rivers and Creeks, for that he did "during the present year, sub-let his woodcutting grant in the Icoorawa Creek, to W. C. Hetmeyer, contrary to Ordinance 14 of 1861, Section 21, Clause 1."

The Superintendent fined defendant Twenty-four Dollars. The defendant appealed.

NORTON, J., gave judgment as follows :—

I reverse this conviction, because it is bad, as disclosing no offence either under Ordinance 14 of 1861, on which it purports to be founded, or, indeed, any offence known to law. The offence created by Ordinance 14 of 1861, Section 21, is the sub-letting or subdividing the interest in any woodcutting *license*, or any license of occupancy, except with the special permission of the Governor. There is no such offence as sub-letting a grant, nor is the defect helped by describing such grant as a woodcutting one, as is done in this information. Although I have no moral doubt, that by the grant referred to, a woodcutting license is meant, still I cannot intend this, as " no " intendment is admitted to help out a description, defective in " the want of an essential component."—Paley on convictions, p. 187, 4th Edition.

I cannot travel out of the record in which it is expressly described in the information as a woodcutting grant, and in the conviction, a grant simply; but were it even competent for me to consider grant here, as equivalent to woodcutting license, the conviction is still so defective that it cannot be sustained, as it discloses no offence at law. The mere sub-letting one's license, is no offence, except under certain circumstances; those circumstances being in the present case the sub-letting without the special permission of the Governor. The law requiring " in all cases where an act made " punishable by Summary Conviction, may be lawful, if performed " under certain circumstances, that these circumstances ought to be " negatived in the conviction, as they are plainly implied, and form " necessary ingredients in the offence."—Fletcher v. Calthorpe, 6, 2. B. and Paley 182.

Again, Lord Mansfield says in R. v. Carden, 4 Bur, 2,279, " that " if the fact as charged may be consistent with the innocence of " the prisoner, no offence is charged. The question then comes to " this; on whom is the onus of negativing the excuse." Clearly on the complainant.

In the matter of James Geswood, reported in 2 Ellis and Blackburn, Q. B., it was ruled that the commitment must shew an offence within the act, that the Statute has been infringed. In this case, Geswood had been committed for absenting himself from his master's service, without *assigning* any sufficient reason, contrary to the form, &c. In delivering the judgment of the Court, Lord Campbell thus expressed himself—" Now, in this commitment, the " offence is so described as to make the gist of it to be, absenting him- " self without assigning any sufficient reason." Had it said, " without " sufficient reason," it would have been right. But as it is worded " he might have a sufficient reason, which he did not assign." Again, another maxim is, that all the facts necessary to support the proceeding, be expressly alleged, and not kept to be gathered by

inference or intendment; Paley (4). Lord Ellenborough thus laid down the rule of law—"That the Court can intend nothing in "favor of convictions, and will intend nothing against them."—R. v. Hazell, 13 East, 141.

It may be alleged that the words contrary to Ord. 14 of 1861, Sec. 21, necessarily imply the existence of those circumstances essential to the act in question being an offence. This is not so, the law being, "that if the charge falls short of the necessary legal description of "the offence, the omission is not cured by any allegation of its "being done unlawfully or fraudulently, or the like, or by stating "that it was against the form of the Statute, for the last allegation "is no more than a legal inference, which must be supported by the "premises;" Paley 139. There, the allegation, that it was contrary to the Ordinance, is no more than a legal inference, which the premises may, or may not support. The conviction in this case, does not follow the prescribed form in the Schedule, and is defective in not stating the time the act complained of was commtited. This is necessary to show that the information was laid within six months from the commission of the alleged offence. I order the grant and licenses to be restored, and the original complainant to pay cost of these proceedings.

Objections still lie to the conviction, which must shew that an offence at law has been committed. The safer course in every case for the Magistrate to pursue, is, to follow the form given in Ordinance 19 of 1856.

STEPHEN DE CAMBRA *v.* ELIZABETH BEN.

8th August, 1863.

(Ordinance 6 of 1855.)

To provide for the Maintenance of the Poor, and for Illegitimate Children.

THIS was an appeal from a decision of Mr. HUMPHREYS, S. J. P. The Magistrate had made an order on the appellant in Review, that he should pay so much per month for the support of his illegitimate child, but the order or minute neglected to state the paternity of the child, and the Magistrate refused to allow the appellant to bring forward a witness on his behalf, which is contrary to the Ordinance 6 of 1855. The decision was reversed.

SMITH, C. J., gave judgment as follows:—

This was an application for Review in an affiliation case before W. Humphreys, Esq., S. J. P., in which the Magistrate made an

order on the defendant; the minute or memorandum whereof is as follows:—"Defendant ordered to pay the complainant the sum of "$4 and the costs of the complaint, 76 cents, and in default of "payment to be distrained, and failing distress, to be imprisoned "for fourteen days, and to pay to the Clerk of the District, on the "1st day of August, and on the 1st day of each succeeding month, "the sum of $4, failing which to be distrained, and in default of "distress to be imprisoned for each offence for the period of 14 days." The defendant disputed the paternity of the child and urged that, from its colour, he could not possibly be the father. In support of this defence he wished to have Dr. Cameron examined as a witness in his behalf, and Mr. Humphreys admits that the reason he did not wait to take Dr. Cameron's evidence was, that, he did not consider such evidence necessary. The 39th Section of the Poor Law Ordinance, (No. 6 of the year 1855), enacts that the Justice shall hear the evidence of the woman, and such other evidence as she may produce, and shall also, hear any evidence tendered by or on behalf of the person alleged to be the father, and it was undoubtedly the duty of the Magistrate to have heard Dr. Cameron's evidence and then to have decided upon the weight to be attached to it. His omission to do this of itself, vitiates the proceedings. But I must further notice that the order is, essentially, defective, and that the Magistrate appears to have mistaken the course to be followed in these cases. In the first place, there is no adjudication that the defendant is the putative father of the child, which is the very foundation of an order of Affiliation, neither is there anything to shew that the money is to be paid for the maintenance and support of the child, nor is there any limit to the time during which the order is to continue in force. It purports to be an order on the defendant to pay $4 a month, to the Clerk of the District for an indefinite time, and even in minor particulars the order is irregular. The Ordinance says the order is to be for a weekly payment; the Magistrate orders a monthly payment; the Ordinance says that the money is to be paid to the mother, or to any person who may be appointed to have the custody of the child; the Magistrate orders it to be paid to the Clerk of the District, and it does not in any way appear, that that officer has been appointed to have the custody of the child, or that he has any legal interest in the matter. In the second place it is quite erroneous to include in an order of Affiliation, a general order of distress, or of imprisonment in default of distress. The Ordinance enacts—"if at any time after the expiration of one calendar month from the making of such order, it shall appear to any Justice upon oath, or affirmation that any sum to be paid in pursuance of such order, has not been paid such Justice may, by warrant, cause such father to be brought before any two Justices (or according to the present Law, before any one Stipendiary Justice of the Peace) to be dealt

with according to Law. Provided, always, that if the woman shall have allowed the weekly payment to be in arrear for more than twelve successive weeks, without application to a Justice, the father shall not be called upon to pay more than the amount due for twelve weeks, and no warrant of distress shall be issued for more than the amount of arrears for twelve weeks." What ought to be done is as follows :—The order of Affiliation should contain simply an Adjudication that, the defendant is the putative father of the child, and an order on him to pay to the mother so long as she shall live and is of sound mind and shall not be in any prison, or to the person who may be appointed to have the custody of the child, a weekly sum to be therein named, until such child shall attain the age of fourteen years, or shall die, or the mother shall marry, with such order as to costs and other incidental expenses as to the Justice shall seem meet. The Order of Affiliation should be formally drawn up and a copy served upon the defendant, and if disobeyed, for the space of a month, the mother may apply for a warrant against him verifying her complaint, or information upon oath. The complaint or information being duly sworn to, the next step is for the Justice to issue his warrant for the apprehension of the defendant, to be brought before a Special Justice to be dealt with according to Law. On the defendant being brought up and alleging no sufficient legal reason for non-compliance with the order, the Magistrate may then issue a Distress Warrant for the recovery of the arrears under the affiliation order, not exceeding the amount due for twelve weeks. If the defendant has no goods and chattels upon which a distress can be levied, then, a Warrant of Commitment may be issued; but it should be distinctly borne in mind, that inasmuch as the Ordinance provides that not more than twelve weeks' arrears are to be recovered in discharge of the whole debt, the mother, to keep alive her claim, for arrears under the order, should apply for a fresh Warrant as each twelve weeks expire without payment.

I have been thus particular in pointing out the right procedure, because, I believed that, misapprehension exists on the subject. The practice in England in Affiliation cases under the corresponding provisions of the Poor Law Act, is well understood, and duly carried out, but there is reason to apprehend that the practice here is somewhat loose, and I trust that the result of this Review, will be to introduce greater regularity and precision for the future.

It only remains for me to say, that I quash, as I do hereby quash the order and all the proceedings in this case. The woman is, of course, at liberty to proceed *de novo*, to establish her complaint, against the defendant, and it will be then, the duty of the Magistrate to hear and determine the case and to adjudicate thereon according to Law.

JAMES RODNEY *v.* JOHN SAMPSON.

14th September, 1863.

(Ordinance 19 and 20 of 1856.)

Power to award imprisonment in default of payment, and in what Cases—Practice generally.

THIS was an appeal from the decision of Mr. FRASER, S. J. P., who had sentenced the appellant in Review, to 30 days imprisonment, and to pay a fine of $24 and costs, or in default of payment two months additional imprisonment, for assaulting the defendant in Review in his duty as Police Constable whilst executing a distress warrant. The sentence of the Magistrate was reversed, but Beaumont, C. J., condemned the applicant in review, to pay the fine and costs in three days. The following is the judgment:—

I reverse the Magistrate's sentence in this case, and condemn the applicant in review, James Rodney, to pay a penalty of $24 and the costs, awarded by the Magistrate; such penalty and costs to be paid by the said James Rodney, within three days after this day.

And I further order the Magistrate to rectify the conviction in this case, in conformity with the terms prescribed in Ordinance No. 20 of the year 1860.

I have reversed the Magistrate's sentence in this case, on the ground of its being unauthorised by Law. Ordinance 20 of 1856, gives the Magistrate no power to award imprisonment in default of payment of a penalty or costs, nor to award costs at all. Ordinance 19 of 1856, Section 33, indeed authorises such imprisonment, but only in two cases:—

1. After levy and no sufficient distress. 2. If it shall appear to the Magistrate that to levy by distress would be ruinous to the defendant's family, or that the defendant has no goods or chattels; neither of these cases occur here. The second case must be "made to appear" to the Magistrate, Judicially, on evidence, and the grounds must form part of the proceedings, and the conviction and sentence should state that it has so appeared—V. Schedule to Ordinance 19 of 1856, I. 1—Section 24 of Ordinance 19, authorises the Magistrate to award costs in cases of summary conviction, and to imprison the defendant for non-payment, but only after having first issued a warrant for distress for them, and having failed to find a sufficient distress.

A penal sentence in Law is so clearly indivisable that it cannot be good in part and bad in part; and this sentence therefore must

be reversed altogether. Thus, it becomes necessary for the Judge in Review, to consider the facts of the case, in order to impose a new sentence, although, under ordinary circumstances he would not reconsider the question of the quantum of punishment awarded by the Magistrate's discretion.

I have therefore adjudged the defendant, Rodney, to pay a penalty of $24, and costs, awarded by the Magistrate. I consider this to meet the justice of the case, nor should I have imposed so severe a penalty had I not considered that the offence is one which, in even its least aggravated form cannot be passed over lightly. But I must say, that so far from considering this case an aggravated one, I think it is one in which there appear no circumstances of aggravation and many of extenuation.

I think the resistance and assault are proved, but only in one particular, viz. :— the hauling of the table in resistance to Sampson, the result of which was, that the latter was pushed or struck by it. The rest of the case is reduced to a mere process with no *malus animus* beyond such excitement and irritation, as must always attend such occasions. Cambridge's evidence, when taken in connection with that for the defence, I think, leaves nothing more in the case.

On the other hand it is plain that Rodney must, naturally, have been greatly irritated at having his goods taken in another man's house for that man's taxes, especially when (as it would seem), his own house had been sold for his own taxes. Perhaps one can hardly imagine more natural cause for excusable irritation, especially when (as also appears), the wife and friend of the landlord begged the officer to wait a little while, in order that they might get from some one, who was, just then a short way off, the amount remaining unpaid—for it seems that part had actually been paid—and after all, no one else took part in the *fracas*. Rodney's friend persuaded him to be quiet; when the table fell back on the Policeman, Rodney immediately apologised for it as an accident, and thus the case, as it appears on the evidence, has really a very simple complexion. It is out of the question to take into account, on this summary conviction, other alleged circumstances as to Rodney's conduct, which are stated by the Magistrate in his note appended to the proceedings returned. The offence, itself, is one which deserves and calls for judicious punishment. If Rodney's conduct had been such as the Magistrate states it, then he might have been punished for that, on a charge brought; he might, perhaps, have been indicted for conspiracy, or for riot; but if this was not done, it can never seriously be said, that the punishment due for *this* offence on summary conviction, is to be extended by a Magistrate to meet other offences.

I have to add that, the proceedings, as returned to me, appear to be in many respects, irregular. The caption ought to shew the Magistrate's District, so that, with the charge, it should appear that the case fell within his jurisdiction; the witnesses' descriptions should be given; the charge should have followed the words of Ordinance 20 of 1856, not that there is any ill result in this case from using the conjunction "and," or even from adding the word "obstructing;" but it happens that there is another Ordinance (No. 20 of 1862), which provides another proceeding for cases of "obstruction," and it was strenuously argued here, that, the use of that word was fatal to the whole proceedings; again, the distress warrant was a material part of the *prosecutor's* case, but it appears in the depositions apart of the defendant's case, and though I conclude that this is a minor *error*, and that it really was introduced on behalf of the prosecution, that ought not to have been done after the defendant's case, as it was not in reply to any of his evidence. In short, when the Plaintiff's case was closed without the warrant, *it failed;* and I may add further, that it does not appear, even now, that, the house where Rodney's goods were, was included in the lots mentioned in the distress warrant. Had either of these points been raised in the grounds of Review, it would have been fatal; and indeed, though I have on the best consideration I can give to it, concluded that, as this case comes before me, the conviction may be sustained, I feel by no means confident, that that conclusion is right.

But there is another point which I must notice especially, because, it must be amended before this sentence can be acted upon, or drawn up, viz.: that on the proceedings, as returned to me, there is no conviction to be found. If, after they had been returned, to the Pro-Sheriff, any action had been brought by Rodney, this might have been found to vitiate the whole proceedings. The Magistrate should, as a matter of regularity, even if Ordinance 20 of 1856, Section 24 and 38, be not compulsory, follow, or as nearly as may be, the forms of conviction contained in the Schedule of that Ordinance; that should be done in this case now; the form being of course filled up in accordance with what took place on the hearing before the Magistrate, and bearing that date; and I may add that it would be safer as the form contains an L. S. to return it *under Seal*, when this amendment is made and not till then. The conviction will be modified by substituting the sentence pronounced by me. In the meantime, in my opinion, it would not be safe to take any step under the conviction, or my order.

IGNATIO GOMES *v.* J. P. CUCKOW, SUB-COMMISSARY OF TAXATION.

10th November, 1863.

(Ordinance 1 of 1837, commonly called the Sabbath Ordinance.)

Selling Spirits on a Sunday.

Imprisonment in excess of Jurisdiction—Liability of Master for Servant's acts.

THIS was an appeal from a decision of Mr. FRASER, S. J. P., who had condemned the appellant in Review, to pay a penalty of $24 and the costs, for selling Spirits on a Sunday. The facts of the case appear in the judgment of SMITH, C. J., which are as follows:—

This was a complaint preferred by the Acting Sub-Commissary of the District, against Ignacio Gomes, for selling Spirits in his Spirit Shop, at Vigilance, in contravention of the Sabbath Ordinance, and the Magistrate considering the charge proved, sentenced the defendant to a fine of Twenty-four dollars and costs, and in default of payment to imprisonment for one month, with hard labour.

This conviction is bad, inasmuch as it imposes on the defendant, in default of payment, a term of imprisonment which the Magistrate had no power to inflict by virtue of the Ordinance under which the sentence was awarded. The maximum term of imprisonment in case of non-payment of a penalty, authorised by the Sabbath Ordinance, is six days, and to impose a month is an excess of jurisdiction which vitiates the proceedings.

But upon the merits, I am further of opinion, that there is not sufficient evidence adduced to sustain a conviction against the defendant. All that was proved against him amounts to this—that on the Sunday in question, two informers went into the shop by the back door; that the shopman and a little boy were alone in the shop, and that, in the absence of the defendant they bought and drank some brandy which was served to them by the shopman. The Licensing Ordinance (No. 15 of 1850), contains an express provision rendering the keeper of every Spirit shop responsible for any breach of that enactment committed by any person in his employment, but no such clause is to be found in the Sabbath Ordinance; and in order to fix a party with penalties under the latter, I am of opinion there should be reasonable evidence either that the party accused, himself did the illegal act charged, or that he caused it to be done by the instrumentality of his Servant, or Agent, who may have authority for that purpose, either express, or implied; actual or constructive. In this case nothing was shewn

to connect the defendant, Gomes, with the act of his shopman. It may be that the Sabbath Ordinance is defective; but that is a question for the consideration of the Legislature, and my duty as a Judge sitting here, is to administer the Law as it is, and not according to any notion I may entertain as to what it ought to be.

For the foregoing reasons I reverse the Magistrate's decision, and quash the conviction.

ANTONIO DE FREITAS, ANTONIO DE FERARA

Versus

GEORGE ALLEYNE. REVENUE OFFICER.

4th January, 1864.

(Ordinance 14 of 1861, Regulating the Renting and Sale of Crown Lands.)

Illegally Cutting Timber on Ungranted Crown Lands.

THIS was an appeal from the decision of Mr. DES VŒUX, S. J. P. It appeared that the Appellants in Review, had been illegally cutting certain timber on ungranted Crown Lands, in Origuia Creek, Demerara River, for which offence the Magistrate had fined them. The documents sent to the Court were of so informal a character, and so irregular that the Judge declined to make any order.

BEAUMONT, C. J., gave judgment as follows :—

The Court having been duly opened, and having heard Mr. Gilbert for the applicants in Review, and there being no appearance for the defendant in Review, His Honor the Chief Justice declined to make any order in this case, inasmuch as the documents forwarded to the Registrar of the Court as an Extract from the Record Book of the information, or complaint, the evidence taken and the decision, are so informal that they must be treated as a nullity and of no force or effect.

MITCHELL JOHNSON *v.* DANIEL JACK.

16th April, 1864.

(Ordinance 23 of 1861.)

Petty Damages.

THIS was an appeal from the decision of Mr. HUMPHREYS, S. J. P. The Defendant in Review, brought an action of damages against

the Appellant in Review—his Goats having come into the former land and destroyed his provisions. The Magistrate gave judgment against the appellant for One Dollar and costs, to be levied by distress. The proceedings in this case were so informal, the Judge could not attribute to them any Force or effect. The sentence was therefore reversed.

BEAUMONT, C. J., gave judgment as follows :—

I reverse the decision of the Magistrate in this case for the following reasons :—

I am obliged to quash or reverse, or discharge the Order, brought under Review in this case,—I say quash, reverse, *or* discharge, because I really do not learn what is the real nature of the Order, and therefore to what specific objections it may be open; or on what specific grounds it might be sustained: whether it is a conviction, or whether it "intends," or proceeds upon a conviction, or whether it is an Order, in respect of the private interest of the complaint, or under what Ordinance it is in either case made. It is enough, however, that the proceedings returned for Review do not show, on the face of them, what their character is, as neither conviction nor penal order under Summary Magisterial powers can be sustained when thus indeterminate.

In minor matters also, but matters highly important the proceedings are wholly informal. No caption; no signature to the depositions; no finding or judgment; no statement of the defendant's presence; nothing to distinguish one part of the proceedings from another. I must observe too, on the important discrepancy between the two copies of what I suppose are depositions which are before me, the copy supplied to the appellant in Review, and that returned to the Registrar. The complainant being made to state in the one case that the trespass was on Tuesday; in the other case on Thursday; I need not say how vital such a mistake might be.

I regret very much to have to take this course upon such unsatisfactory grounds, viz.: that whatever the merits of the case may be, the documents which purport to record the proceedings in the case, are so informal that I cannot attribute to them any force or effect. This is the more to be regretted, and there can be the less reason for it, inasmuch as the Magistrates, are by various Ordinances and the forms prescribed in them, furnished with directions, which, if they were only pursued (of course with that reasonable discretion which must be observed in adopting general forms and rules), would prevent the possibility of such proceedings being set aside on formal grounds. Not only is every form prescribed, but printed for the Magistrate's use, with a reference on it (which, by the way, every Magistrate is also expressly directed to make in his Record Book), to the Ordinance under which it is prescribed.

I might indeed, form a guess that the defect of form in this case, is of a fundamental kind, and that these proceedings are of that character as not to be the subject of Review at all, but of a civil nature under the Petty Damage Ordinance; if so they are the subject of an appeal to the Inferior Civil Court, but being brought before me on Review, I must judicially look at them in the light in which I have done so and act accordingly.

I set aside the Magistrate's Order in this case.

THOMAS SAMPLE *v.* ROBERT HOPKINS.

30th April, 1864.

(Ordinance 20 of 1862.)

Assault where title to land is in dispute.

THIS was an appeal from the decision of HUMPHREYS, S. J. P., who had fined the Appellant in Review, $12, and costs $1 76, for assaulting and beating the Defendant in Review. It appeared that the assault rose from some dispute as to title of land, in which case the Magistrate has no jurisdiction.

BEETE, C. J., reversed the sentence of the Magistrate for the following reasons:—

I reverse the decision of the Magistrate in this case, because it appears to me that, the assault complained of, was one, strictly, within the intention of Section 47 of Ordinance No. 20 of the year 1862, and that the Magistrate had no jurisdiction to try it at all.

EDWARD JAMES *v.* SPENCER CAMBRIDGE.

14th May, 1864.

(Ordinance 1 of 1863.)

Villages Ordinance.

THIS was an appeal from the decision of Mr. FRASER, S. J. P. The Defendant in Review, had brought up the Appellant in Review, before the Magistrate, for acting in an urgent and oppressive manner (as he thought) while executing a levy warrant for taxes, under Section 19 of this Ordinance. The Magistrate was of a

different opinion, and dismissed the case. The Judge reserved the final disposition of the case. The facts of the case will more fully appear in the judgment which BEAUMONT, C. J., gave as follows :—

This is the case of a petition of complaint, presented to Mr. Fraser, Stipendiary Magistrate by Edward James, under the provisions of the 19th Section of Ordinance No. 1 of 1863, which authorises—"any person considering himself aggrieved," "to complain" of anything done unjustly, or oppressively" in regard to a levy or sale of goods effecten by distress under that Ordinance.

The complainant here alleges that, his house at Friendship Village, was broken open by Spencer Cambridge, (a Collector of Rates), and assuming to act under the authority of the Ordinance in question, in co-operation with certain Policemen, and he presented his petition to the Magistrate; complaining of this as "unjust and oppressive."

The Magistrate has dismissed the complaint on the grounds which I do not think it necessary to weigh or remark upon, because I do not propose, at present, at all events, to dispose of the case upon its merits.

The Section of the Ordinance in question contains no provision whatever, as to what is to be done upon such a petition, and I am not disposed, in a case where there is open to the petitioner another remedy, and still less so if such remedy is a more suitable one, to enter upon the difficult task of enquiring and deciding what relief (if any), a Magistrate or this Court may administer under this provision, and how that discretion (for plainly in the absence of a prescribed remedy, the application of any, which may be found admissible, must be discretionary), ought to be examined.

The Solicitor-General indeed suggested for the Petitioner that, I might refer the case back to the Magistrate for reconsideration, but I apprehend that *reconsideration* would be a very unsatisfactory course to require of the Magistrate, unless I could furnish him with some guide to the practical result of such reconsideration. He also, asked me that I would, at all events, declare that the conduct of the overseer was unjust and oppressive, and order him to redeliver the articles levied on, to the petitioner.

Now, I am quite satisfied that it would be quite out of place and derogatory to this Court, to make such a declaration as was suggested, without proceeding to afford a remedy; and as to the specific remedy of re-delivery, I could not in any event, order that its being shown that the goods are in the possession of Cambridge, which has not been done or suggested.

The proposition, however, that I should take means to ascertain the value of the goods, and order the payment of that amount, by

Cambridge, forces me to recur to the difficulties on the threshold of the petitioners' case; viz.:—

1stly. Whatever remedy the section in question may authorise, was it intended to apply to such a case as this?

2ndly. If the Section does apply, does it empower the Magistrate, or this Court to award damages, or any, or what penalty?

The difficulties in the way of a satisfactory answer to the second question, I have already alluded to; but I think it also requires much consideratien to enable me to say that the Ordinance meant; in providing for cases of "injustice and oppression," to give a new remedy for conduct of direct illegality and violence. It is true that such illegality may be unjust and oppressive, but in a legal sense it would rather seem that such character is lost, or merged in its more positive illegality, and the frame and language of the Section, and the vagueness of its remedial provisions might rather lead to the inference that it was intended to apply to hardships arising within the legal administration of its provisions, and to give to the Magistrate some power of control and moderation as to the proceedings of the Overseers and Collectors, authorised under that Ordinance.

Now, here the complaint made is of violent, riotous, and illegal conduct, which might give occasion, if well-founded, either to a right of Civil Action, or to the proceedings of a nature directly penal, or criminal. These are the proper remedies known to the Law, and assuming that the complaint was well-founded, there can be no question that it is a case much more fit for one of such remedies, than for any remedy which I could see my way to afford on this petition.

In the face of these difficulties and considerations, I do not feel authorised to make any order at present in this case; but inasmuch as the questions arising under the Ordinance, are of some difficulty, and as if my doubts about this case falling within the provisions of the Ordinance should turn out to be unfounded, it might, perhaps, follow that the petitioner after having sought this remedy, would be deemed precluded from taking any other course, I do not think it right to dismiss this Review, but with this expression of my opinion, I reserve the final disposal of the case.

Of course I do not, myself, entertain the opinion that the petitioner would be so precluded, or I should feel bound to face the several questions to which I have adverted.

DONALD YOUNG, SUB-COMMISSARY *v.* GILBERT MONRO.

28th May, 1864.

(Road Ordinance No. 30 of 1856.)

Failing to effect Sundry Works ordered by Commissary.

THIS was an appeal from the decision of Mr. CHIGNARD, S. J. P., who had dismissed a case brought by the Appellant in Review, against the Respondent in Review, for having failed to effect sundry works ordered by the former to be done on the Public Road of Plantation *Fear Not*, by serving a Road Notice on him according to Law. This case turned on the point, whether the Sub-Commissary, as well as the Commissary, had jurisdiction in serving Road Notices, and ordering repairs to be done to the roads without the authorization of the Commissary, there being two officers at this date, the latter office being now done away with. The Judge remitted the case to the further hearing of the Magistrate, should the appellant in Review, think he could establish his charge.

BEAUMONT, C. J., gave the following judgment:—

This case comes before me in the shape which seems to require me to determine a question of some importance as to the construction of the Road Ordinance (No. 30 of 1856), taken in connection with the Commissary's Ordinance (No. 16 of 1858).

The merits of this case are not before me; nor indeed, are any of the facts disclosed so as to enable me to see in what precise way, or with reference to what point of the proceedings, the question of Law arose upon which the Magistrate appears to have decided, and which is now submitted for my judgment. Suffice it, however, that upon his view of that point he declined to hear the case, and thus it becomes necessary for me to consider it. But at the same time, and although my judgment upon that particular question seems to be that on which the Magistrate acted, I am not able to see, or to say whether the dismissal of the case would, or would not, properly follow from that view; and thus, although I am of opinion that the "Sub-Commissary of Taxation," has no specific and inherent authority under the Road Ordinance, I must remit the case for further hearing by the Magistrate in case the complainant considers that he can establish his complaint in conformity with my decision of the single point which, at present, seems sufficiently disclosed to require decision.

That point, as I gather it from the papers before me, is whether

or not, a Sub-Commissary of Taxation is entitled to exercise any of the functions, or authorities reposed in the "District Inspector" under the Road Ordinance of 1856. I think he is not so entitled to exercise any such function or authority as requires a specific statutory sanction, though, of course, there are many matters of mere administration (investigations, reports, communications of various kinds) which require no such authority. But the statutory powers given to the Inspectors do not, I think, extend to the Sub-Commissaries. The Road Ordinance (Section 3), appoints the "District Registrars," and the "Sub-Registrars" of Divisions, to be and act as "Inspectors and Sub-Inspectors of Roads and Bridges for the "Districts and Divisions in which they may be employed under the "provisions" of Ordinance 29 of 1856, and then throughout the rest of the Ordinance, a number of specific duties and authorities are conferred on the District Inspectors and persons to be authorised by him in writing; but there is not one single authority conferred on the Sub-Inspectors, or even any allusion to them after the 3rd Clause. This has led me to consider whether I cannot construe the words "District Inspector," so as to include Sub-Inspectors; but I think I cannot do so. The different phrases in Section 3 are too distinctly referable to one another. The "District Registrars," and "Sub-Registrars of Divisions," referring exactly and respectively and distributively to the "Inspectors and Sub-Inspectors of Roads and "Bridges for the Districts and Divisions, in which they may be "employed." This being so clear to my mind, I need hardly advert to any apparent inconveniences which have been suggested; but I can readily conceive that, the theory of this Ordinance (and not an irrational one) was to require that, the Sub-Inspectors should have a specific authority from the District Inspectors to enable them to act in their behalf in cases in which such substitution is authorised. Under section 5 of Ordinance 16 of 1858, the powers of the Sub-Commissaries are defined to be those formerly exercised by the Sub-Commissaries at the date of the Ordinance 31 of 1856, and those of the Sub-Registrars under Ordinances 30 and 31 of 1856; 16 of 1857, and 8 of 1858, none of which confer on the Sub-Registrars the powers of District Inspectors.

With this expression of my opinion, I remit the case for the further adjudication of the Magistrate.

If the complainant should not think proper to proceed with the complaint again, and should the Defendant desire to have the case disposed of by a formal dismissal, he may apply to this Court for that purpose; but at present the proceedings seem to me in such an incomplete shape that I ought not to dismiss the case without giving the complainant an opportunity to complete it.

GEORGE BASCOM *v.* SANDY HAZZARD.

28th May, 1864.

(Ordinance 2 of 1853.)

Masters and Servants.

THIS was an appeal from the decision of Mr. HUGGINS, S. J. P.; who had dismissed a case brought by the appellant in Review, against the respondent in Review, a task-gang driver, for a breach of contract, in not performing certain work he had engaged to do at Plantation *Windsor Forest*. The Magistrate held that the task-gang driver was not a servant under this Ordinance, and could not be held responsible, because the other laborers he had employed had left their work, they not being privy to the contract. It might be a case for compensation for damages, but with that he had nothing to do.

BEAUMONT, C. J., concurred with the Magistrate, and gave judgment as follows :—

I dismiss this Review, and condemn the applicant for Review in the costs of Review, for the following reasons :—

In this case I shall dismiss the application for Review, as I concur with the Magistrate in thinking it is not one falling within the provisions of the Master and Servant Ordinance, No. 2 of 1853.

The Solicitor-General sought to establish, on behalf of the appellant, that the forfeiture imposed under Section 10, of that Ordinance, is merely by way of damages, as upon breach of contract; that it is compensation to be assessed and awarded *civiliter*, and that the clause, or the penalty, or the proceeding under it, is not of a penal nature. This argument was used in order to remove some of the difficulties which occur in the way of treating this case as a penal one. But I cannot acquiesce in that view. I think, on on the other hand, though the amount is made payable to the employer, it is not the less a penalty. That it does not necessarily rest on the footing of compensation; but on the other hand the full forfeiture might, in many cases, be justly imposed where there might be no actual damage occasioned by the act complained of, and that, in short, this provision does not stand on a different footing in this respect from the other cognate provisions of the Ordinance which are unmistakably of a penal character.

Then, is it possible for this penal Section to be so interpreted consistently with the ordinary and well-known rules of construction

applicable to such cases, as to extend the obligation and liabilities of Servants under it, to a person such as this defendant, who has contracted to do a job with a task-gang at a given price? I feel satisfied that it cannot; that the Section contains nothing applicable to such a case, even if it could be reasonably suposed that such a case should or could be so provided for, I say nothing about whether the contractor or driver would be so far a servant that, if he wilfully neglected his own part of the work or fraudulently induced his men to strike off work, he might be so made liable under this Ordinance. It is sufficient in this case, that he does not undertake in the personal character of servant, the performance of the job which he engages to carry out by means of the gang. He may be as between the employer and the gang, and as to so much of the work as to requires their co-operation, a contractor, an agent, a supervising servant it may, perhaps, be; but he is not, in my opinion, liable to perform as servant to his employer, the whole work.

Now, here the only complaint is, that he did not do the work; that he did try to do it as far as his own means and the co-operation of such of his own men, as he could keep to the work, is quite clear. He appears to have been ready to do, and to have done, his utmost; certainly, he neither "suspended his labour," nor "induced "any person working with him to suspend his labor," within the meaning of the Ordinance.

Nay, there appears good ground for thinking that it is owing to the employer's own act, in seeking to alter the arrangements with the defendant's gang and the mode in which the work was to be done, that they left him and refused to go on with the work. Moreover, the employer of himself took to the work, while the defendant was yet engaged at it. He did this, as he says—"being "anxious for the work to be done, and seeing no chance of his "completing his contract with me"—and, having done this, he actually employs the defendant as a labourer. "He worked with "my Coolies and Chinese," says Mr. Bascom, "and with them was "paid, without reference to the contract, into which he had entered." Under such circumstances, I think the complainant has no pretence whatever, to sustain a complaint against the defendant under this Ordinance, and accordingly, I dismiss this Review, with costs.

FRANCIS DE SILVA *v.* H. H. GREAVES.

18th June, 1864.

(Sabbath Ordinance, Section 5 of No. 1 of 1837, since repealed by (Ordinance 5 of 1867.)

Selling Rum on Sunday, contrary to Ordinance.

THIS was an appeal from a decision of Mr. FRASER, S. J. P. It appeared that the appellant in Review, had sold a pint of rum on Sunday, the 9th of May, 1864, contrary to this Ordinance, for which he was fined $24 and costs, to be levied by distress: failing sufficient distress, to be imprisoned for eleven days. The sentence of the Magistrate was, set aside, the Judge remarking that the form of the charge was in substance, wrong, and that the word provisions was a flexible term, and might include generous fluids as well as solids.

BEAUMONT, C. J., gave judgment as follows:—

I reverse the Magistrate's decision in this matter, and set aside the sentence, with costs.

This is a case in which some document, which is not a conviction, but which is accompanied by a Magistrate's sentence, is brought before me on Review, by one Francis de Silva.

I will address myself to what I may suppose to be, and what was argued as the substance of the case, inasmuch as while some of the various irregularities in the procedure, might be remediable, I feel justified in deciding at once, on the essential features of the case, so as to quash and set aside the irregular decision of the Magistrate altogether.

The main question raised by the case would appear to be, whether or not the facts given in evidence disclose any violation of Article 5 of the Sabbath Ordinance, 1837.

To consider whether there was any *opening* by the defendant, *of his shop;* or whether the Rum said to have been sold, was *exposed for sale* within the meaning of that Section, would lead to a minute consideration of contradictory evidence as well as of the Ordinance, which I am glad to avoid. And, therefore, I prefer to confine my attention to the points which fully entitle the applicant to have this order, or sentence discharged. The Section in question on which the whole case would turn, if its substance be considered as before the Court, contains a prohibition of the opening of Shops and exposing for sale, goods in certain terms and subject to certain penalties; and then follows this proviso, "that nothing herein

"contained shall extend, or be construed to extend to prevent the "sale of medicines in any Store, or Shop, or of provisions for "consumption, in any Inns, Taverns, or victualling Houses, on "Sunday, &c." Now, the article alleged to have been sold is *Rum*, and if *Rum* be a "Provision" within the meaning of that clause, the charge must fail.

I don't think there is any satisfactory evidence to shew that the defendant's shop was not a Tavern, or Victualling House. It is true that the *locus in quo*, is called a *Shop;* but it would require much consideration before I could hold that such description of it excluded the operation of the proviso. It is not necessary, however, to pursue this enquiry, for I think it quite clear that, looking to the frame of the clause, a charge or complaint founded upon it should state that the sale, if of provisions, was in such, or such a place, "not being an Inn, Tavern, or Victualling House." The proviso which limits the prohibition, must in short be excluded in terms, before there can be a good charge, or conviction for a breach of such prohibition. Here there is nothing of the kind in the charge, while, as I have said before, there is no conviction at all.

Well then, is Rum an article which can be for this purpose included under the word "provisions"? Now, that is no doubt, a flexible term; at first sight when used to mean supplies for consumption and alimentary support, it may, perhaps, be thought rather to intend solid articles of food; but, I think this is clearly not its absolute and sole meaning. For instance, in speaking of provisioning Troops, or Ships, I think the word, though distinguished sometimes from watering, usually includes the more generous fluids which are, by some, thought themselves, to be of the nature of meat as well as drink. I might multiply instances, were it necessary, to establish thus much, that it is a term which, at all events, may reasonably include fluids for consumption. If this be so, on reading the words, "Inns, Taverns, and Victualling Houses," I cannot doubt that it has that larger meaning in this proviso; "Victualling House," might not lead much in that direction, and even "Inn," might not be conclusive, but the special addition of the word "Tavern," furnishes, I think, a clear indication that it does so. No doubt that word, anciently, had not so special a meaning; but since the early part of the last century, and certainly for many years past, a Tavern has borne ordinarily, and when used in addition, or distinction to such words as "Inn and Victualling House," I think specially the signification of a *drinking house*. I am, therefore, of opinion that in this clause the word "provision," includes Rum, and therefore that it is necessary, before any person can be convicted under the Sabbath Ordinance for selling Rum on Sunday, to exclude the application of the proviso in question, in the charge, the evidence and the conviction. On this ground therefore, looking at the merits

of this case, the Magistrate's order must be quashed and reversed.

I should be glad to stop at this point, but I should not be justified in not observing on the irregularities which appear on these proceedings, some of which, perhaps, might be fatal though others might be remediable. I feel the more bound to notice certain of these, because they are defects on which I have repeatedly had occasion to remark before. One of these is a defect of very serious importance which the Legislature, following the example of the mother country, has taken pains to guard against, but which I find Magistrates frequently, and in some cases systematically, if not studiously overlook. I refer now to the neglect or I may almost say, the repudiation of the forms furnished for their guidance, by the Crown, under the provisions of the Ordinances in that behalf. I, by no means, mean that in using them, the Magistrate will not still have to exercise abundant care to use them rightly, but that they would be a security, as they are meant to be, against errors of a formal and even of a substantial kind is quite certain. In this case, for instance, there is no conviction of any offence on the record; but had the Magistrate used the form I. 1, in the Schedule to Ordinance 19 of 1856, he would have avoided this serious defect; and though, of course, the formality of such conviction would not have cured the defect, in point of substance of the charge, against the defendant, the careful use of those forms would greatly tend to call attention to such defects, and so to avoid errors of substance as well as of form. Again, this sentence, had it proceeded on a good charge followed on a good conviction, would have been illegal in a material point, which the Magistrate has not only had carefully called to his attention by the Statutory forms of convictions (which include both the conviction and the sentence), but as to which, as well as the former point, I have myself had occasion to dilate upon in this place before. What I now allude to is, the provision for the recovery of the fine imposed, by imprisonment to be followed by another term of imprisonment for non-payment of the costs. This is a clear error which the use, the careful and not the blind use, of the Statutory forms would have prevented.

There are other points which I ought also to notice—1stly, the defects of the charge in not stating that the day of the alleged offence was on Sunday; and 2ndly, the stating a date which was *not* a Sunday. I am aware that the defendant's Counsel waived these points before the Magistrate, but it must be remembered that, (whatever may be the power of Superior Courts about exercising jurisdiction by consent, which is the effect of waiver in such a case), consent could not cure such a defect in a penal charge, while the power of amending such charges is not confided to the Magistrates. I notice this, because though in this case the appellant's Counsel, of course, did not feel himself at liberty to make the objection,

such a practice might lead to serious errors and confusion. It must never be forgotten that the first and most essential requisite to a good conviction is, a complaint good in substance and in all essential forms, and nothing could be more important, in such a charge as this, than the accurate statement of the day on which the offence was alleged.

I need say no more about this case than that the order made by the Magistrate must be set aside with costs.

RICHARD STRAHAN *v.* J. N. DARRELL, COMMISSARY.

29th October, 1864.

(Ordinance 12 of 1867.)

Relating to Licenses.

THIS was an appeal from the decision of Mr. BRUMELL, S. J. P., who had convicted the appellant, in Review, in $10, and costs, 76 cts., for exposing goods for sale in a shop without having a licence for the same. This sentence was reversed by the Judge, as the jurisdiction of the Magistrate was not shewn in the proceeding, which was a fatal error.

BEETE, J., gave judgment as follows:—

I reverse the decision of the Magistrate for the following reasons:

In this case the plaintiff in Review was charged by the respondent in Review, "with having opened a shop on Lot No. 37, Bentinck Street, N. C., and with having exposed therein for sale on the 12th "day of August, 1864, goods, wares, merchandize, or provisions, "without having provided himself with a Licence, to do so, as "required by the 9th Section of Ordinance No. 12, anno 1864, and "contrary to the provisions of the 3rd Section of Ordinance No. 15, "anno 1861," and was sentenced by the Magistrate to pay a fine of $10, with costs, to be recovered by distress, and failing sufficient distress, to be imprisoned with hard labor for ten days.

It was contended, that this sentence was an illegal one, and ought to be reversed on several grounds; but it is only necessary to advert to one of them which, alone, is sufficient to warrant a reversal of the Magistrate's decision.

I refer to the objection that there is nothing in the charge, or in the evidence, to shew that the alleged offence was committed within the jurisdiction of the Magistrate. The offence is stated in the

charge to have been committed in Bentinck Street, N. C., and the only reference to the *locus in quo* in the evidence, is by the witness, John Thomas Davis, who speaks of "the defendant's shop in Ben-"tinck Street."

The case therefore comes within the rule as expressed in the case of Peacock *v.* Bell—1st, Saunders, p. 74, viz. :—"The rule for "jurisdiction is, that nothing shall be intended to be out of the "jurisdiction of a Superior Court, but that which specially appears "to be so; nothing shall be intended to be within the jurisdiction "of an Inferior Court, but that which is so expressly alleged." And the conviction must therefore be quashed.

JOSE FRANCIS *v.* A. M. BETHUNE, COMMISSARY.

29th October, 1864.

(Sabbath Ordinance No. 1 of 1837, Section 5, since repealed by No. 5 of 1867.)

Selling Rum on Sunday.

THIS was an appeal from the decision of Mr. JEFFREY, S. J. P., who had condemned the Applicant in Review to pay a fine of $24 to be levied by distress, failing sufficient distress to be imprisoned for thirty days, for selling rum on Sunday, contrary to this Ordinance. Under this Ordinance a Magistrate could not impose a heavier sentence than six days. The judge considered this a fatal error, and reversed the sentence.

BEETE, J., gave judgment as follows :—

I quash the conviction of the Magistrate for the following reasons :—

In this case the Plaintiff in Review was charged with a Breach of the regulations contained in the 5th Section of Ordinance No. 1 of 1837, entitled "an Ordinance to ensure a better observance of the "Sabbath Day, and otherwise to promote habits of Morality and "Decency," by having unlawfully sold and delivered a certain quantity "of Rum in the Licenced Retail Spirit Shop of Josè "Gomes and Feliciano Gomes, the same not being an Inn, Tavern, or Victualling House."

The Magistrate after hearing evidence in support of the charge, and also, for the defence, found the Plaintiff in Review guilty, and adjudged him to forfeit and pay the sum of $24 and costs, to be levied by distress, and in default of sufficient distress, to be imprisoned in the Gaol at Georgetown, for the space of thirty days.

It was contended that this judgment is contrary to Law, inasmuch as by the 9th Section of the Ordinance above referred to, the Magistrate was only authorised to award six days imprisonment in case of non-payment of the penalty imposed for the breach, or violation of any of the regulations contained in such Ordinance.

I consider this objection fatal to the conviction, and consequently it must be quashed.

CHARLES CAHUAC *v.* F. BIRCH, SERGEANT OF POLICE.

21st January, 1865.

(Ordinance 10 of 1851.)

Sales of Liquor without License—Reasons of Appeal must not be vague—Reference to Ordinance in Complaint binds Complainant—Alternative Charges.

THIS was an appeal from the decision of Mr. BRUMELL, S. J. P., who convicted the Appellant in Review, for Selling two glasses of Brandy in his House or Shop, without having a licence for the same. The Judge reversed the sentence of the Magistrate and condemned the Respondent in Review to pay the Applicant's costs.

The facts of the case fully appear in the judgment of BEAUMONT, C. J., which is as follows :—

I set aside the decision of the Magistrate, and condemn the Defendant in Review in the costs, for the following reasons :—

This is a case in which the Appellant asks the Court to quash, or reverse a conviction by the Police Magistrate of Georgetown, "for "that he the said Charles Cahuac did, on the 17th day of September, "1864, in his house and premises, situate in Commerce Street, "Georgetown, suffer to be sold by retail, a certain quantity of a "certain excisable Liquor, to Wit: one gill of Brandy, to George "William Harding, at and for the price of one shilling, the said "Charles Cahuac, not being then and there duly Licensed so to do, "contrary to the provisions of Sec. 2, Ord. 10 of 1851." And which conviction is followed by the adjudication of the penalty of $24 and costs. Some of the written reasons of Review alleged, are perhaps too vague to take notice of. One to which a good deal of argument was addressed, is as follows :—"that the conviction in "these proceedings is bad," but I think it, at least, doubtful whether this reason is not alleged too vaguely to allow me to consider its force. I do not think it necessary to determine that however, because there is one reason alleged within which, I think, this case

may be disposed of, viz.:—"that the information in these proceedings, does not charge the defendant with any offence."

It must never be forgotten that a charge, or information good in Law is at least as essential to sustain a Summary Conviction, as it is to support a conviction according to the ordinary course of Law; and that, speaking in general terms, the same rules are applicable to such informations as to indictments. Of course the first essential is, that it must charge the defendant with an offence of which the Magistrate can take cognizance upon such proceedings; therefore, this reason if sustained, will be sufficient to invalidate the whole proceedings, and to this reason, and the arguments addressed to me, which fall within it, I shall confine myself.

The information runs thus:—"I charge Charles Cahuac with "having on the 17th September, 1864, contrary to the provisions of "the 2nd Section of Ordinance 10 of 1851, unlawfully sold or dis-"posed of, or suffered to be unlawfully sold and disposed of, "on his premises, &c., two glasses of Spirituous Liquor, the same "being less than 40 gallons, and he not having obtained and not "being in possession of a Retail Spirit Licence as required by the "3rd Section of Ordinance 10 of 1851."

The charge, therefore, is of having done an act in contravention of Section 2 of Ordinance 10 of 1851. Now, that Section is as follows:—"2. And be it enacted, that Section 3, of said Ordinance "No. 15, of the year 1850, shall be, and the same is hereby "repealed, and instead of said Section 3 in said Ordinance, the "following shall be the Section 3, that is to say—3. And be it "enacted that Licences to be granted under any Ordinance for the "sale of Spirituous Liquors, shall be of two kinds; the first kind "for the sale of Rum in any quantity not less than ten gallons, "and of other Spirituous Liquors in quantities not less than two "gallons, to be called a Liquor Store Licence, and the second kind "for the sale of Spirituous Liquors in quantities not exceeding five "gallons, divided into five classes, numbered from one to five, "respectively, and termed respectively, a First Class Retail Spirit "Licence, a Second Class Retail Spirit Licence, a Third Class Retail "Spirit Licence, a Fourth Class Retail Spirit Licence, and a Fifth "Class Retail Spirit Licence."

I may, perhaps, suppose that in framing the charge the complainant was misled by the frame of the Ordinance, and that on looking at the figure *2*, (which in Sec. 1, commences the Law there enacted in substitution for Sec. 2 of Ord. 15 of 1850), took that figure to indicate that such Law was the second Section of that Ordinance, but that is a mistake which I cannot remedy, nor can I even be sure extrajudicially, that such mistake occurred though I am led to think it probable, because, the clause in Section 1 so headed with the numeral *2*, *does* contain a prohibition of the

sale of Spirituous Liquors in less quantities than forty gallons, whereas the real Section 2 of the Ordinance itself, does not contain any such prohibition; whether that provision, if referred to in any such mode in a penal charge, should be referred to as Sec. 1 of Ord. 10 of 1851, or Sec. 2 of Ord. 15 of 1850, may, perhaps, be a question. I need not try to solve it however, because, it is quite clear that, at all events, it is *not* Sec. 2 of Ord. 10 of 1851, which is the Section on which the complainant expressly rests his charge.

I then turn to the real Sec. 2 to see if the charge can be sustained under its provisions. It commences by repealing Sec. 3 of Ord. 15 of 1850, and goes on to substitute a new and similar one, the whole extent and object of which is to *classify* "Licences to be granted "under any Ordinance for the sale of Spirituous Liquors." It is plain that the direct object and effect of this clause is, to impose no obligation, to create no offence, and to inflict no penalty. I have carefully considered whether according to the well-known principle adopted in the construction of Statutes, a reference such as that in this information, to this Section, could be treated as importing the aid of all other enactments *in pari materia*; but in the first place, and speaking broadly, it is for the purpose of helping the doubtful construction of supplying the defects apparent upon due comparison in particular enactments, that this reference to matters *in pari materia* is admissable; whereas, in this case there can be no doubt about the meaning of the clause itself; nor does it appear to be defective within its proper scope. In the next place a reference to matters *in pari materia*, is only admissable in a very limited and qualified degree in criminal or penal matters, and must be admitted the more jealously when employed in order to support penal proceedings which are upon the first impression defective.

The information however, contains another blot very similar in its nature and origin to that which I have discussed so far. In negativing that the defendant had a License—it says "not being in "possession of a Retail Spirit Licence as required by the 3rd Sec. of Ord 10 of 1851." Now, that Section makes no such requirement, it does nothing more than repeal Sec. 12 of Ord. 15 of 1851; and the information therefore contains no denial of the defendant's having had a Licence to sell Spirituous Liquors pursuant to those provisions of the Law which do impose the obligation.

Here then, is a penal case in which the complainant has chosen to charge the defendant with an offence under a certain specified Law. He need not have specified the Law. *i. e.* not in the way in which he has chosen to specify it by referring to the particular Ordinance and Sections; but he has done so, he has fallen into a mistake. Can I, in order to help him out of such mistake, and to construe his charge so as to "intend" an offence and refer to other

enactments, *in pari materia*, and by applying them to the evidence endeavour to sustain the proceedings? I am satisfied after careful consideration, having felt some doubt in the first instance, that to do so would be to contravene and transgress the plain principles applicable to the requirements and the construction of such charges.

There is however, another particular in which this information cannot be sustained. It charges the Defendant with having "unlawfully sold, or having suffered to be unlawfully sold." Now, stringent as are the rules requiring certainty and exactitude in indictments and other penal charges, I do not intend to go so far as the Solicitor-General argued, viz.: that nothing may be stated in the alternative; but though matters explanatory or of inducement merely, may perhaps, be sometimes put in the alternative it is quite clear that offences cannot. There is none of the certainty which the Law requires in such a case in the statement that a person committed one offence, *or* another. I might illustrate the importance of this rule in many ways, but that it is too clear to require elaboration, *a fortiori*, if one of the alternatives is *no offence*. It clearly has not even the color of a charge to say that a man did something which is an offence, *or* something which is not. Now, here it is quite clear that it is no offence, "to suffer to be sold." I do not mean that there are not cases in which suffering to be sold in fact would amount to an offence, but it would amount to the offence of *selling* which, under some circumstances, might be committed by a guilty sufferance; nor do I lose sight of certain express provisions making keepers of Licensed Houses liable for the acts of their servants; but this case does not fall within those provisions. There is no Law prohibiting or making penal the sufferance of such a sale as alleged. And if such an act can be brought within the Law prohibiting the sale, it is because of circumstances which are matters of evidence. We have here then, a charge in the alternative, and one of the alternatives a charge of something which is not legally chargeable as an offence. That information cannot be sustained, and the whole of the proceedings fall with the information.

In disposing of the costs of this case, I have had some hesitation inasmuch as the points on which the appeal turns are mostly matters of legal, rather than general consideration, but they are not questions of any obstruse, or intricate nature, and the Court of course cannot sanction the doctrine, that whenever the result turns on considerations of this sort the complainant who fails on appeal ought to be relieved of the liability to costs, to the detriment of the respondent who succeeds only after having been forced to incur those costs. The safe general rule is, that the party who succeeds gets his costs. It is said that here the respondent was acting in the performance of a public duty. Now, in a certain class of cases that is a ground which is recognised for varying the application of

the rules applicable to costs; that class of cases is, however, very limited and certainly this does not fall within it. It would be very unfortunate to discourage public officers, whether responsible or subordinate, in the performance of their duties, but it would be still more unfortunate and dangerous and quite opposed to the policy and spirit of our Law to lead them to consider themselves free from the restraint of those ordinary rules which are applied not only as a measure of justice, but as a wholesome precaution and safeguard. In such cases as this moreover, the Solicitor-General pointed out very truly that the plaintiff had a personal pecuniary interest which is of itself a circumstance greatly qualifying any claim which he might otherwise have to the special consideration of the Court. On the other hand it is said that the case is one in which though he has succeeded, the defendant was acting in a mode at least suspicious and doubtful, whether illegal or not being a question that cannot be discussed on an invalid charge. As to that it must be said that the supposed illegality rests not only on an invalid charge and doubtful evidence but upon doubtful propositions of Law. In such a case I could not consider so far that there are any circumstances to sway me on one side or the other, beyond the fact that the appellant has succeeded in appeal. There is, however, one other matter which I cannot lose sight of and which I think would make it impossible to give the credit which is said to be due to his official character. I do not doubt for a moment that he acted *bonâ fide*, according to his sense of duty, but it is clear that the course taken in this case, as in several other cases, before me, is open to great objection. For the consideration of this question of costs, I am entitled to look at other matters which are before me judicially, and I find that in this and three other cases in which the respondent has instituted similar charges, two Police Agents have been employed to proceed in the same way. Whether they were employed by Birch, or not, or whether all were employed under superior orders, I have no means of judging; but this is before me that they acted together, that Birch being a Sergeant of Police has adopted and made himself responsible as complainant in all these cases which are similar in their circumstances thus far. Two Policemen, one man Hardings, being the chief actor in this and the other cases, go into a shop (which I will take to be a suspected shop), and purchase liquor, and thereupon having themselves prompted the defendant to the alleged offence they proceed to Sergeant Birch, who upon their evidence, prosecutes the several defendants for such sale. Now, this has nothing in common with the ordinary exercise of detective vigilance which however distasteful and repugnant, it often is, is one of the recognised means of enforcing the Law, and which is, I think, discharged in a very zealous and on the whole, a creditable way by the Police Force. It may be legitimate, subject to due restrictions, to act as these wit-

nesses did, in order to obtain a clue to what is going on, or evidence of illegal conduct or plans. Nay, where there *is* an illegal proceeding on foot, such officers may under due restrictions, even take part in it, in order to frustrate it; but it can never be allowable for a public officer to go and ask a person to commit an illegal act in order to prosecute him for it. To illustrate, more clearly, this distinction, I will suppose a case of felony, forgery for instance; it might perhaps be allowable to a Police Officer, knowing of a gang of forgers, to consort with them in order to discover and punish their crime, but it would be not only wrong, but itself a crime to go to an Engraver with a Bank Note and offer him a sum of money to engrave a plate and print forged notes from it. Persons so acting would be guilty as accessories if not as principals, and I think it might go very hard with them even in such a case as this if they were indicted for conspiring to induce the Defendant to commit an illegal act; how can it be said that this is really a case of detection on the alleged ground that the act charged was only part of a system. Such a system is not proved against the Defendant; nor is it alleged even. If he has offended in other cases, let those cases be proved; but he is charged only with one offence, and that alleged offence he committed at the prompting of the police.

To avoid any misconstruction of what I have felt called on to say, I think it right to point out that this case must be distinguished, not only from cases of detective vigilance, but also from another class of cases with which it may be confounded, viz., informations and actions *qui tam*, as they are called, in which informers, no doubt, often took the course which has been taken here. But not only have such proceedings always been held odious, and, indeed, they have been mostly, if not wholly, abolished; but there is this essential difference, that those were civil actions, although for penalties; this is not only a penal, but a criminal proceeding.

An information to be followed by summary conviction, fine or imprisonment *with hard labour*, and on a third offence it may be referred to the Inferior Court of Criminal Justice.

On these grounds then, the Complainant must be considered to have miscarried altogether in the course adopted by him, and he must pay the Appellant's costs.

MARY ROBELLO *v.* JOSEPH BIRCH, SERGEANT OF POLICE.

21st January, 1865.

(Ordinance No. 10 of 1851, and 15 of 1861.)

Sales of Liquors.—Licenses.

THIS was an appeal against the decision of Mr. BRUMELL, S. J. P. The Appellant in Review was charged with selling one bottle of wine to be drunk on the premises, without having a licence for the same, and was sentenced to pay $24 and costs, or be imprisoned for twenty-four days.

The facts of the case fully appear in the judgment of BEAUMONT, C.J., which is as follows :—

I set aside the decision of the Magistrate, and condemn the Defendant in Review in the costs, for the following reasons :—

This case is similar in its nature to that of Cahuac *vs.* Birch, but it differs in its circumstances and material aspects.

Here again, there are certain reasons of Review alleged, which are too vague for the Court to entertain. But there remain reasons which I think sufficient to lead to the reversal of these proceedings.

The charge is, that the Defendant, Mary Robello, sold on her premises a bottle of wine to be drunk on the premises, whithout having a licence to sell wine and malt liquor, less than two gallons, or a Retail Spirit Licence.

Now, amongst the reasons of Review is this one—" that no licence " is required by law to sell malt liquor"—I presume that the words " malt liquor," are used in mistake for " wine." I could not however, alter them; but the substance of that reason seems to recur under another head, viz., " that the information does not charge the " Defendant with any offence."

In this case, by the Complainant avoiding the difficulty which he tripped over in the case of Cahuac, of specifying the law in which he rested, it has fallen upon the Court to try to ascertain what the law is imposing the obligation which the Complainant says, and the Magistrate has found that the Defendant has violated. No law was suggested which prohibits the sale of wine without a licence, as the sale of spirits is prohibited; nor have I been able to find any such law. Mr. Birch, however, appeared to rest his case on Section 3 of Ordinance 15 of 1861, imposing a penalty on the conviction of any person for neglecting to take out any licence " required to be " taken out by him, under the provisions of any Ordinance," and

he argued that the requirement to take out a licence for the sale of wine was imposed by the following Section of the Tax Ordinance of 1864—"For every licence authorising any person in the City of "Georgetown, or the Town of New-Amsterdam, to sell wine and "malt liquor, in less quantities than two gallons, to be drunk on "the premises, &c., there shall be paid the sum of Thirty Dollars, "and in any Rural District, the sum of Fifteen Dollars."

To infer from the Section a prohibition of the sale of wine and malt liquors without a licence, would certainly be a strong inference; and the difficulty would be, of course, greater in inferring from a Clause fixing the amount of duty for a licence to sell wine and beer, a prohibition of the sale of one of those liquors As however there may be a good deal to be said in support of that inference, which seems so far to have been assumed, I prefer not to express any decision upon the point. I feel myself at liberty to avoid doing so, as there are other grounds quite sufficient to dispose of the case. In any event, the direct inference, if any such could be drawn and applied to penal purposes, would be that of a requirement to take out a licence, such as contemplated by that Section, and the prohibition of sale without a licence would be only a secondary result in the contemplation of the supposed law requiring a licence to be taken out. What then is the offence in such a case? Not the sale, but the neglect to take out the licence for the sale. But that is not the offence alleged in the information, which charges the Defendant with *sale* as the offence, and negatives the licence as the necessary condition of its occurrence.

Now, it might, perhaps, be argued that this is only a question of terms, of two modes the one exact, the other inexact but sufficient, in which the offence is stated. That is often a nice question, and might, perhaps, be so here, as I put it to Mr. Solicitor General when arguing for the appellant. He readily furnished me, however, with a decisive test, viz., a practical difference resulting from the two modes of stating the case. In this case, as stated in the information, the sale being alleged as the offence, the condition being the exclusion of the protection *or* exemption which a licence would afford, the law would throw on the *Defendant* the proof that she had a licence; whereas if the charge had been framed for neglecting to take out a licence, the *Complainant* would have to prove the neglect. This satisfies my mind that the information does not duly state an offence under Section 3 of Ordinance 15 of 1861, which appears to be the only law applicable to the case.

Although this point would, I consider, be sufficient to dispose of the case, I think it right to add, that if I could come to a different conclusion upon it, the Appellant must equally succeed on another ground alleged, viz., that the conviction is against the evidence. I am not now speaking of the *weight of evidence*, which is a

question that, as a general rule a Court of Appeal does not entertain, but entirely against, or I should say without evidence; I am of opinion that it is so when the charge is looked at in that light, which is now being considered, viz., that of neglect to obtain a licence, through treating it in what I have considered, is its real interpretation, viz., a charge of selling under circumstances said to be penal. I can see that the evidence might be thought to sustain such a charge in point of fact, if it were sound in point of law.

But what evidence is there of Mary Robello having neglected to take out a licence to sell wine and beer? There is indeed proof of the fact that *she did sell wine;* but how, even on the assumption that the Tax Ordinance imposed the obligation alleged, how did the obligation attach *to her?* Are there not hundreds of men and women employed to sell liquors in shops whether licensed or not, on whom there is no obligation for them to take out a licence? But it is said that the sale was in "her premises;" it is said so in the information and in the conviction, but I do not think the evidence can be considered to give the least support to the charge, or the finding.

It is true, that two policemen, Hardinge and Sinnott, speak loosely of the shop where the sale took place, as being "her shop." I say *loosely*, because that is an ordinary use of the pronoun, which may well be applied to any occupant of a house or shop, whether principal or subordinate; and its true meaning is shewn by the Complainant's own witnesses. Sinnott in another place speaks of it as "Jose Robello's shop, in Hadfield Street." Hardinge in another place says—"She sells in the shop, though it is not her shop," and the Complainant says—"She sells in a shop in Hadfield Street, and "her husband sells in the same shop; I don't know who the shop "belongs to." It is manifest that there is no evidence whatever to sustain the allegation that the sale was in her premises, or to make her responsible for a charge of neglecting to take out a licence for the sale of "wine and malt liquor there."

On these grounds, I am of opinion that the proceedings in this case must be set aside, and the Respondent must pay the Appellant's costs.

MARY MARTIN *v.* JOSEPH BIRCH.

21st January, 1865.

(Ordinance 10 of 1851.)

Sales of Liquor.

THIS was an appeal from the decision of Mr. BRUMELL, S. J. P. The circumstances are similar to those of Mary Robello *v.* J. Birch.

The decision of the Magistrate was set aside by BEAUMONT, C.J., because the information was bad, and the learned Judge referred to his judgment in the case of Cahuac *v.* Birch, giving judgment as follows :—

I set aside the decision of the Magistrate, and condemn the Defendant in Review in the costs, for the following reasons—

This is a case very similar to that of Cahuac *v.* Birch, in which this Court has reversed the proceedings before the Magistrate.

In the several points upon which Cahuac's case was decided, it is precisely similar, and as the Appellants succeed in both cases and the Respondent is the same in both, I shall not give my reasons at any greater length than to say, that the ground on which I set aside the proceedings before the Magistrate is, that the information in this case was bad in the several particulars following :—

First.—That it charges the Defendant with the offence of illegally selling Spirituous Liquors, contrary to "the provisions of Sec. 2, "of Ordinance 10 of 1851;" whereas that Section creates no such offence, and imposes no obligation on the breach of which the charge can rest.

Second.—That even if the offence could be spelt out from other enactments than that stated in the charge, the information does not negative the Defendant being duly licensed; it only says, that he had not a Retail Spirit Licence, as required by Sec. 3, of Ordinance 10 of 1851; a Section which makes no such requirement.

Third.—That the information charges the Defendant with "having "sold, or suffered to be sold." Such charge is bad for being in the alternative *a fortiori;* it is bad for stating as one alternative "the "suffering to be sold," which is not in itself, and as distinguished from selling, chargeable as an offence.

These points are explained by me at full length, in my judgment in Cahuac's case, and the proceedings here must be set aside with costs.

JOSE GONSALVES *v.* JOSEPH BIRCH, SERGEANT OF POLICE.

21st January, 1865.

(Ordinance 10 of 1851—Since repealed.)

Sales of Liquor.

THIS case is very similar to that of Mary Robello *v.* J. Birch. It was an appeal from the decision of Mr. BRUMELL, S. J. P., who convicted the Appellant in Review for selling a bottle of porter in his shop, without having a licence for the same.

See judgment of BEAUMONT, C. J., in case of Mary Robello *v.* J. Birch.

I set aside the decision of the Magistrate, and condemn the Defendant in Review, in the costs, for the following reasons :—

This case is very similar to that of Robello *v.* Birch, in which this Court has reversed the proceedings before the Magistrate. Indeed, they are precisely similar in their material aspects. The charge is framed in both as one of selling without a licence, and when so interpreted, it is no charge; on the other hand, if it could be read as a clumsy mode of charging the offence of "neglecting to "take out a licence," under the Ordinance of 1863, *there is not* a syllable of evidence to sustain it. Indeed, for anything that appears, the Appellant actually did take out the licence, which he is said to have required.

The offence here is the unlicenced sale of porter, and the objection that no licence for the sale of malt liquor is required, is expressly and correctly taken. I do not think, however, that obliges me to express any decision on the question, as the proceedings must be set aside with costs, for the reasons adverted to above. I need not repeat the exposition of those reasons, which I have given in full in my judgment in Robello's case, inasmuch as the Appellants succeed and the Respondent is the same in both cases.

LUIS VALADARES *v.* A. M. BETHUNE, DISTRICT COMMISSARY OF TAXATION.

18th February, 1865.

(Ordinance 10 of 1851, and 1 of 1837.)

Alternative Charge framed to fall under alternative Ordinances.

THIS was an appeal from the decision of Mr. J. D. FRASER, S.J.P., who convicted the Appellant on a charge of selling, *or* allowing rum to he sold on a Sunday.

BEAUMONT, C. J., gave judgment as follows :—

I set aside the decision of the Magistrate, and condemn the Defendant in Review, in the costs, for the following reasons :—

This is a case in which the Appellant seeks to have the proceedings before the Magistrate set aside, on grounds which are precisely the same in substance as certain objections which I had lately to consider and act upon, in the case of Birch *v.* Cahuac, where I reversed a similar Summary Conviction. There are some points of difference between the two cases, but they are identical in several material points, in consideration of which I reverse the proceedings in this case; and as my decision on those points was expounded at considerable length in my written judgment in Cahuac *v.* Birch, I shall here only refer to them shortly.

The charge on which the Appellant is convicted is an alternative charge of selling *Rum, or* suffering it to be sold, without being duly licenced so to do. Now, a charge so stated is no legal charge at all, and can sustain no conviction without considering the uncertainty introduced by any such alternative statement, one of these alternatives is no legal offence. There is no law which makes it an offence for one person to suffer another person to sell rum.

Nor is there any room from the evidence, to contend that if the informality of the charge could be overlooked, or cured, the Appellant has transgressed the law. A man who was his servant, is said to have sold some rum in his shop; but there is no sort of evidence that it was done with his knowledge, or by his authority. For anything that appears, if the sale took place at all, (and on that point there is, at the least very weighty evidence in contradiction to that given in support of the complaint), it may have been absolutely unauthorised by, and contrary to, the express orders of the Appellant.

On the contradictory evidence to which I have alluded, I need say nothing. As far as I can see, it lies in a shape which would

not have permitted me to review the Magistrate's decision, had there been any occasion for me to do so, which, as the matter stands, I think there is not.

There is, however, another point in the case to which I ought to advert, though I should, perhaps, rather call it another phase of the case, as it gives rise to the same questions as those to which I have already adverted.

The information is not only alternative, as to the circumstantial matter of the offence charged; but is also alternative or I may say, double as to its legal nature. In effect it charges the Defendant with two offences; one of selling, or suffering to be sold without a licence, the other, of doing so contrary to the "Sabbath Ordi-"nance." I need not discuss whether this mode of framing the case would not itself invalidate the proceedings; but at all events the case stands no higher under the Sabbath Ordinance, than it does as an offence against the law regulating the sale of Spirits, while there is an additional reason why the proceedings could not be sustained under that Ordinance. Inns, Taverns, and Victualling Houses are exempted from the application of the Sabbath Ordinance, and here it is not shewn either by the information, conviction or evidence, that the Appellant is not included in that exception. The information indeed states, that he has *no licence* to keep an Inn, Tavern, or Victualling House, but that is altogether another question. Whatever licence a man may require under other laws, it is not as the holder of such that he is exempted from the Sabbath Ordinance, and, consequently, a statement that he has not a licence has no force or effect, while, as to evidence, there is not a word of evidence bearing on the point. Thus, though the Appellant's premises must be shewn not to fall within the exceptions specified in it, in order to bring him within that Ordinance, in point of fact, they may actually be a Tavern, as there is no allegation to the contrary.

On these grounds, therefore, I must set aside the conviction and proceedings in this case, with costs.

AJOHN *v.* A. M. BETHUNE, DISTRICT COMMISSARY OF TAXATION.

25th February, 1865.

(Ordinance 22 of 1861.)

Opium—Framing of charge—Variance between charge and Conviction.

THIS was an appeal from the decision of Mr. J. D. FRASER, S. J. P.

BEAUMONT, C. J., gave judgment as follows :—

This is the case of a Review of a conviction in the following terms—For that he the said Ajohn, when called upon on the 14th October, 1864, "to account for 14¾ lbs. of Opium, left in his pos- "session on the previous visit of the District Commissary of "Taxation, viz., Tuesday, the 13th September, 1864, and to produce "his book of entries, as required by Section 5, Ordinance 22, anno "1861, failed either to account for the Opium, or to produce his "Book."

This conviction proceeds on an information or charge, in the following terms—

"I, the undersigned, District Commissary of Taxation, charge "the Chineseman 'Ajohn,' Licensed Retail dealer in Opium, "residing on Plantation *Lusignan*, for that he, when asked on "Friday, the 14th of October, 1864, did fail to account for 14¾ lbs. "of Opium, left in his possession the previous time I visited his "shop, viz., Tuesday the 13th September, 1864, contrary to "Section No. 5, Ordinance No. 22, anno 1861."

"ALEXANDER M. BETHUNE,
"District Commissary Taxation,"
"Division No. 6, Friendship House,
"October 24th, 1864."

To J. D. FRASER, Esq.,
"Stipendiary Magistrate, &c., &c., &c.
"District A."

Now, the first objection that arises to these proceedings, is, at their commencement, there is no effective, nor valid charge, and as I have frequently had to observe in these cases, such a charge is the basis of all Summary Convictions. Indeed, wherever there is not a charge complying with the essential requisites of the law, the whole proceedings are *coram non judice.*

The first essential then is, that the charge should state an offence cognizable by a Magistrate. The charge here is, that "when asked" he "failed to account for 14¾ lbs. of Opium, left in his possession "the previous time I visited his shop, contrary to Section No. 5, "Ordinance No. 22, anno 1861." Is there any such offence cognizable by a Magistrate? I find none; I find nothing in the Section referred to, which requires an Opium dealer upon request to account for Opium which may have been in his possession. I know of no other provision of the law, imposing such an obligation. The Section in question does, indeed, impose a number of very specific obligations and prohibitions, of keeping and shewing a book, making entries, selling Opium in a certain way, and not otherwise, and for each offence contrary to its provisions, it imposes a penalty, not less than Twenty-four Dollars. But it is utterly out of the question to suppose that a general charge of "failing to "account" is to be intended as a good charge of the breach of any of these specific requirements. If that were arguable, the question would immediately follow, "*which* proviso does it allege an offence "against?" The answer must be, "I cannot tell, it is not stated," and the only consequence is, that such a general charge *cannot* be considered a sufficient charge of any offence under that Section. The Magistrate appears to have felt this, for in his conviction, he has departed from the charge, a departure which would, itself, have been fatal to the conviction; but putting that variance out of the question, and supposing that a Magistrate could make a valid conviction on an invalid charge, he has, nevertheless, while attempting to cure the defect of the charge, fallen into new errors in the conviction. In the first place, the conviction does not shew that Ajohn is a "dealer in Opium or Bhang," so as to fall within any of the provisions of the Section in question. In the next place, it convicts him of having when called on to account for the Opium, and to produce his book of entries, failed to do one *or* the other. Now, this is an alternative that not only must avoid the conviction, but in terms of it would seem to confess its infirmity. It runs thus— "For that he, the said 'Ajohn,' when called upon on the 14th of "October, 1864, to account for 14¾ lbs. of Opium, left in his possession "on the previous visit of the District Commissary of Taxation, "viz., Tuesday, the 13th September, 1864, and to produce his book "of entries, as required by Section 5, Ordinance No. 22, anno 1861, "failed *either* to account for the Opium, or to produce his book." I should, in reading this, attribute the words, "as required by "Section 5, Ordinance No. 22, anno 1861," to the request, with which is immediately coupled, viz., "to produce his book of entries," and if so, the conviction itself appears to recognise that the request to account for the Opium was *not* enforceable by the law; but at all events, as it is not provided for by the law, the Magistrate having convicted him of having failed to do one or the other, when

requested to do both, and that conviction proceeding on a charge merely of not "accounting;" it cannot be considered a good conviction. I may add, that, not only does the conviction not find that Ajohn was a dealer in Opium or Bhang, but although the information is formally correct in that point, and in that point only, there does not appear to have been any evidence to support it.

Another objection taken by Appellant is, that he, although Defendant, was summoned as a witness to produce his Opium book, and that being so summoned, he was examined on oath. It is manifest that both these steps were irregular. A Defendant in a penal case cannot be summoned as a witness, either to produce books, or to give evidence; and if examined as such, the whole proceedings are bad. I do not forget that the Appellant's Counsel is said to have asked that he should be sworn; but that was when he was called on his summons and was asked for the book, and I apprehend that under such circumstances, Counsel would be acting within his right, in saying, "Swear him before you proceed "on the summons." That is all that appears; but even had he been sworn, at the express request of his Counsel, the irregularity would be no less, however out of place it might be to take advantage of it.

I must not omit to observe, that it would appear from the proceedings returned to me, that the Appellant was not called on for, or given any opportunity to make his defence. I presume that this arises from an omission in the Record, rather than on the proceedings themselves, as such an omission would vitiate them altogether. Not being specified in the reasons of appeal, however, I need not notice this further, but on the various other grounds mentioned above, I set aside, and reverse the conviction with costs.

CHUN-CHAI-CHING *v.* A. M. BETHUNE, DISTRICT COMMISSARY OF TAXATION.

25th February, 1865.

(Ordinance 22 of 1861.)

Opium—Evidence.

THIS was an appeal from the decision of Mr. W. H. WARE, S. J.P., who convicted the Appellant on the charge set out in the judgment:—

BEAUMONT, C.J., gave judgment as follows:—

This is a Review case, in which the Appellant complains of a conviction made by the Magistrate, "That he being a Licenced "Retail Opium Dealer, of Plaisance Village, in the Parish of St. "Paul, did fail to make an entry in the Opium book, kept by him, "of 10 lbs. of Opium, taken by him out of the Colonial Bonded

" Warehouse, on the 25th August, 1864, on or about the time of " his receiving 10 lbs. of Opium, in violation of Section 6, of Ordi- " nance 22 of 1861," followed by a sentence to pay a fine of $40 and costs. Substantially, that conviction follows the terms of the information in which it proceeds; the only difference which I need observe being, that, the information describes the Defendant as a " Licenced Retail Opium Dealer, residing in Plaisance Village," and then proceeds, " for that he did, &c."

The first objection urged to the proceedings was, that the information and conviction charge no offence, no legal offence. I cannot, however, accede to that argument. I think there is enough precision in the charge and conviction, taken in connection with the Section of the Ordinance on which they are founded, to enable me to say that it charges Chun-Chai-Ching with having " failed to " write up the book kept by him in his shop in Plaisance, under " the provisions of the Opium Ordinance, on the 25th day of " August, 1864, by inserting an entry of his having on that day received 10 lbs. of Opium, which he then did receive with particulars of name and address, as required by the Ordinance. That, if so alleged, it would be an offence against the very terms of the Ordinance. I admit that both charge and law, in terms, do not specify one very important circumstance, on which my decision will in effect turn, viz., whether the Opium was received at the shop in question or not; but still the charge would follow the very terms of the Ordinance which creates an offence, and I think that it is not an excessive intendment in favour of the law, to hold that the law and the charge necessarily imply that the alleged receipt of the Opium was by the Defendant, at his shop in Plaisance, and at all events, for, and in respect of, that shop *in point of law.* What I mean by saying " in point of law," will appear presently.

It is then said, that the conviction has proceeded on inadmissable evidence, and is against evidence. Of course, if this were a mere question of the weight of contradictory evidence, I should not enter into the objection. But it is based on the admission of inadmissable evidence, and it is further urged that, such evidence apart, there is none whatever against the Defendant. It was said that in the first place, the Complainant ought not to have been allowed to speak of the contents of the book, as he does in support of his case. Now, at first sight, I must allow, this would appear to be a sound contention, but at the same time it is a point on which I hesitate to give a judicial decision, if not actually forced to do so. I am not disposed to leave questions of this kind in doubt when they arise in the Magistrate's cases, as I think it is not right towards them, or the public to do so; but this is a question of sufficient importance to make me decline to decide the point, when, as here, it can be avoided.

The Complainant proceeds then to prove the alleged receipt of

the Opium, but I cannot help saying, that I find here no admissable evidence of its receipt at all. The Complainant speaks thus—"No "entry had been made of 10 lbs. of Opium, which Defendant had "received from the Bonded Warehouse, on the 25th August, accord- "ing to permit handed to me by Defendant's book-keeper, which "entry was not made till 10th November, 1864. The permit which "I saw was to remove 10 lbs. of Opium from the Bonded Warehouse "in Georgetown, to Defendant's Retail Opium shop in Plaisance. "I cannot swear that the entry of the 10th November of the 10 lbs. "stated is, the Opium, to have been received on the 25th August, "but my impression is, that it was so."

This is all the evidence on the point. As the Defendant's Counsel admitted the receipt of 10 lbs. of Opium from the Bonded Warehouse, on the 25th of August, without enquiring whether that is such an admission as could be acted on adversely in a case of this nature, this question arises, whether the Opium so received was received *at*, or in point of law *for*, this shop at Plaisance. It appears that in point of fact the Defendant has *two* shops; one at Plaisance, and one at Georgetown. It is quite plain that there is no direct evidence, that it was received *at* the shop. The only matter in the nature of evidence is, the statement that, on the 10th of November an entry of 10 lbs. was made in the shop-book, as to which Mr. Bethune cannot swear that it stated it to have been received on the 25th August, though he says, his impression is, that it was so. It is manifest that such a statement can amount to nothing when standing alone. But then he says that, "Defendant's book-keeper" shewed him a permit to remove 10 lbs. of Opium from the Bonded Warehouse, to his Plaisance shop. Now, I have come to the conclusion, that this evidence is not admissable, for that even if any secondary evidence of the contents of the permit could be given under the circumstances, such evidence as this is of no value, nor even relevant, when considered by itself. It is possible that with the addition of other circumstances effecting the Defendant, it might become relevant; but taken by itself, it would only be relevant by obtaining a permit to remove Opium to a particular shop; a dealer was bound by law, to remove it to that shop, and no other, so as to make his receipt of the Opium a receipt of it for that shop, in reference to the law in question. Is that the effect of such a permit in point of law? I think not. The law does indeed require the permit to state the place to which the Opium is intended to be removed, and that so far, it *contemplated* that the Opium should be taken there, may be admitted, but I find no provision making it the duty of the person taking the permit, to remove it to that place. That may be a defect in the Ordinance, but so the case stands, though every obligation which the Ordinance imposes on licenced dealers is carefully enforced by penalties. It might be urged, however, that the permit would be admissable evidence,

though perhaps slender evidence, that the Opium was in fact, taken to the shop, as having proceeded on an assumed statement by, or on behalf of the Defendant, of his intention to take it there; but in this view of the case, I think the evidence as tendered, is still inadmissable, as I think it would only be admissable in that sense, upon shewing something as to the circumstances under which the permit was taken out. The *terms* of the permit do not affect the Defendant further than the law directs, unless some independent evidence be given of his personal adoption of those terms. In short, without going so far as to say that there may not be some cases in which, where documents are in the possession of persons accused of penal offences and are not produced, secondary evidence may be given of their contents. I am clear that such cases must be very special ones, in which the document of which such evidence is tendered, would appear to afford evidence clearly relevant and admissable if it were produced; and looking to the nature of this case, the other evidence given, the nature of this document, and the mode in which its contents have been spoken to, I am forced to conclude that Mr. Bethune's evidence about it was not admissable, and if this is excluded, there is *no* evidence that the Defendant received the Opium in question, at the shop in Plaisance, where the information and evidence lay the case.

I have felt indeed, considerable hesitation as to the inadmissibility of the evidence commented on, but having in the result come to a conclusion on this objection, I do not think it necessary to enquire into other points which were raised by the Appellant's Counsel, but on the ground stated above, I reverse, and set aside the conviction and proceedings in this case, with costs.

JUAN MARTIN *v.* A. M. BETHUNE, DISTRICT COMMISSARY OF TAXATION.

18*th March*, 1865.

(Ordinance 1 of 1837.)

Sabbath Selling—Exposing for Sale.

THIS was an appeal from the decision of Mr. J. D. FRASER, S. J. P. Section 5 of the Ordinance 1 of 1837, is now repealed by Ordinance 5 of 1867.

BEAUMONT, C.J., gave judgment as follows:—

This is an appeal against a conviction under Section 5, of which is called the Sabbath Ordinance, No. 1 of 1837, for selling Rum on Sunday.

Various objections were raised. It is enough for me to notice two of them, on which I shall dispose of the case.

It was said that there was here no case of *the opening* of a shop, or *exposure* for sale. As to the matter of fact, I would not have been disposed to examine into the Magistrate's conclusion from the evidence, as to whether there had, or had not been actually an "*opening*" of a shop, or an "*exposure*" for sale. If either of such offences had been in question; but in truth neither of them is alleged by the information, or found by the conviction. The charge and conviction are for "selling." Now, the Ordinance contains no prohibition of selling on Sunday; its object, so far as Section 5 is concerned, at all events, would appear to be to secure the better outward observance of Sunday, for it provides exclusively against the opening of shops, or the exposing for sale, or to barter. I have no doubt that it was wisely so framed; and that such a law is quite sufficient to provide for all cases within its scope. In cases for instance like the present, it would be open for the Magistrate's conclusion, on a charge properly framed, to give rise to the enquiry, whether there had not been an opening of the shop, or an exposure to sale, notwithstanding that the alleged purchasers found their way in by a back door, and so on. But though the facts in this case might have supported a charge and conviction for such offences, neither they nor any other facts could support a charge or conviction for "selling" merely, which the law does not prohibit. On this ground, therefore, that the charge and conviction state no legal offence, the proceedings must be set aside.

I shall only add, that, it is curious that though the charge does state that the shop where the alleged offence took place was not an Inn, Tavern, or Victualling House; the conviction does not do so, and consequently, had a violation of the Ordinance been formally stated, and otherwise duly found, these proceedings must have failed from this omission to negative the exemption contained in the law in question.

I reverse, and set aside the conviction and proceedings herein, with costs.

RUFINO THEODORE MACEDO *v.* ELIZA ANTHONY.

18th March, 1865.

(Ordinance 6 of 1855.)

Affiliation Order—Alteration by one Magistrate of Order made by another—Orders in general.

IN this case, Mr. J. D. FRASER, S. J. P., made an order increasing the allowance payable by Appellant to Respondent, under an order made by Mr. Crosby, S. J. P. The facts appear in the judgment.

BEAUMONT, C.J., gave judgment as follows :—

This is a case in which Macedo seeks to have an order made by a Stipendiary Magistrate, reviewed and set aside. This order appears to be in the nature of an Affiliation Order. I say *in the nature* of such an order, because it contains no adjudication of paternity, but assumes that the Defendant is the putative father, upon the footing of a supposed former adjudication said to have been made some years ago by another Magistrate, by whom an order is said to have been made for the payment, by the Defendant, to the Applicant, of a weekly allowance of 48 cents.

The application is in writing, and is for "an increase of allowance," and upon that application the Magistrate has made the following order :—

"I adjudge and order, that the sum ordered by James Crosby, "Esquire, S. J. P., of 48 cents per week, be increased to $1 20 per "week, in order that the child may be educated and better cared for."

"J. D. FRASER, S.J.P."

"This order to take effect from the 1st February, proximo."

J. D. F., S.J.P.

Now, it is quite clear, that this is no order at all, and the Defendant might, probably, have disregarded it *in toto*. My only doubt in the case is, whether or not, I ought to review the proceedings; but on the whole, I think that, as they purport on the face of them, to be Magisterial proceedings, resulting in a Magisterial order, the Appellant is entitled to be freed from any risk which he might be under of their being enforced, or sought to be enforced against him, and accordingly I think it right to set aside, and reverse the proceedings.

The grounds on which they must be reversed are these—In the first place, the Magistrate has no jurisdiction whatever, in the matter. The terms of the law on the subject are very specific and

guarded, so that, though by no means technical, they require to be carefully pursued. The only order which a Magistrate is authorised to make for an allowance to a mother of a bastard child, from the putative father, is under the 40th Section of Ordinance 6 of 1855, "upon such adjudication as aforesaid;" i. e. upon an adjudication on the fact of paternity pronounced under the provisions of Sections 38 and 39. The only other powers reposed in him in the matter, are powers for carrying out this original and so far, final adjudication under various circumstances of default, death and so on.

A Magistrate, therefore, has no power to increase an allowance once determined on under the 40th Section of the Ordinance, and if the proceedings had been otherwise never so formal or regular, the Magistrate in this case could not re-consider the adjudication pronounced by his predecessor. But here there is, really, no proceedings at all. Not only, was there no jurisdiction to entertain the question, but the question has not been entertained in any judicial form. There is nothing, whatever, before me but the woman's application; a report of something said by the Defendant to the effect, merely, that he desires to have the care of the child himself; a number of statements and comments by the Magistrate, and the *quasi* order which I have already mentioned. There is not one sylable of evidence of any kind, and even if what was said in such an informal way by the Defendant, is tantamount to evidence of paternity, there is no adjudication of the fact, nor any sort of evidence either of the form, adjudication, or of the position of mother, daughter, or father. The *quasi* order of the Magistrate, however, has not even the elements of a legal order in point of form, and more than of jurisdiction. It neither states who the order is made on, nor who it is made in favor of, nor who is the child in respect of whom it is made, nor any period during which the weekly payments are to continue, nor any time certain at, or from which they are to commence, although in a sort of note, it states it is "to take effect from the 1st. February;" a phrase which may, or may not be susceptible of judicial interpretation, but which, certainly is most ambiguous on the face of it.

When the case was brought before me, I took it for granted that it was by some accidental miscarriage that no more formal proceedings, and no evidence whatever were returned to the Court, and I intimated to the Applicant's Counsel, that I would direct the Registrar to apply to the Magistrate to learn whether the absence of any recorded evidence was not accidental, and that upon the evidence being received, I would communicate with the Appellant's Counsel, in order that he might attend again upon the case. I am informed by the Magistrate, however, that there really was no evidence or proceeding taken or had, other than what appears by the paper forwarded by him to the Court. I think it due to him to state the reason which he gives in the following terms:—"I did

" not take any minutes in the case, the parties being all before me, " and the circumstances having been detailed in the complaint which " was read to the Defendant, and to which he made the statement " I have forwarded, the same parties having appeared before me so " very frequently during the last six years, on the subject in " question, the payment of the allowance, 48 cents per week, no " new evidence could be imported into the case."

It is enough for me to say that the whole matter has been *coram non judice*, that there was no jurisdiction in the Magistrate, that the proceedings before him were entirely unjudicial, that there is no legal complaint, no evidence in support of the Applicant's claim, and no valid decision or order.

Of course, as I have thought, the case is one in which the Appellant is entitled to have this declared in Review. The proceedings are reversed with costs; but I trust that this may be only a formal order, and that no attempt will be made to press it against the Respondent.

JOSE DE SILVA *v.* ROBERT PARKER MANN.

18th March, 1865.

(Ordinance 14 of 1861.)

Crown Lands—Woodcutting—Abbreviations in stating title of tribunal—Jurisdiction—Hearsay evidence.

THIS was an appeal from a decision of Mr. F. E. DAMPIER, Superintendent of Rivers and Creeks. The nature of the case is sufficiently indicated in the judgment. The Ordinance 14 of 1861 has been materially altered by Ordinances 1 of 1869, and 12 of 1871.

BEAUMONT, C. J., gave judgment as follows :—

This is a case in which the Appellant seeks to have reviewed the proceedings upon a charge made against him by Robert Parker Mann, an Assistant Revenue Officer, of cutting and making shingles on ungranted Crown Lands, of which charge he has been convicted, and for which he has been fined in the sum of $15 04, and has been ordered to pay the Complainant's costs.

Various grounds were put forth by the Appellant to invalidate and reverse these proceedings, some of which I shall notice as being matters which may give rise to doubt, and which consequently, it is desirable should not be over-looked, although I shall only determine the case upon one ground which is, I think, clear enough in the Appellant's favor to compel me to set aside and reverse the proceedings and decision in this matter.

In the first place, it is said with a force which, perhaps, it is difficult to repel, that the whole of the proceedings are invalid, inasmuch as the jurisdiction of the Magistrate does not appear. The offence is one cognizable by those Magistrates only who are also Superintendents of Rivers and Creeks. It is cognizable by them in respect of that office, which is, in fact, a separate office, though so far it partakes of the Judicial or Magisterial functions. It is true that no part of the proceedings clearly shows that the convicting Magistrate fills that office, and it is highly important that these matters should appear distinctly on the face of the proceedings. The established rule with regard to all proceedings before subordinate Tribunals, being that they must shew on the face of them, every thing which is essential to their validity in point of jurisdiction, so that Executive officers, who may be called on to recognise, or act on them, and who do so at their own risk, may have a sufficient guide in discharging their responsibility, and that the superior Tribunals who may have to Review or examine them, may have the means of doing so effectually. There are, however, appended to the signature of the Magistrate in this case, certain abbreviations and initials, which I cannot further interpret than that they commence with an abbreviation for "Superintendent." Under these circumstances it would be highly unsatisfactory to reverse the decision on this ground; but the same objection recurs as to the *place* where the offence is said to have been committed, that is described in the charge and conviction merely as "ungranted "Crown Lands, in Araqua Creek;" nor is there any specific evidence (if such could have been admissable) to prove that the *locus in quo* is even within the Colony. It might, however, be argued that there is what is called an *intendment*, that such is the case. An intendment to be drawn from the use of the phrase, "ungranted Crown "Land," and although that argument appears to me somewhat dangerous in such an application of it to penal proceedings, I do not think it necessary to determine its exact force in this case. It is evidently, however, *highly desirable*, to say the least, that the requisite allegation of the place being within the jurisdiction of the Magistrate should be found in the proceedings, and should be made out by evidence, so specifically as to avoid such objections. It is exceedingly easy, and it is the practice invariably adopted in Criminal cases tried before the Supreme Court.

It was then said that the conviction must be reversed, because the Defendant was found by it, to be a grant holder in Araqua Creek, and that no proper evidence was furnished of that fact. Here it is, perhaps, more than doubtful that any such evidence was requisite, or whether the finding is not mere surplusage as far as the proceedings and the conviction go; whether it is fit that such a matter should for any collateral purpose be gone into at all, upon such a proceeding is a point on which, I do not think myself called

on to express an opinion in this case.

The ground on which, however, I think, these proceedings must be reversed is this—That the only evidence which appears to apply to the Defendant, personally, is hearsay evidence, which ought not to have been admitted *primâ facie*. The presumption is that the manager of the Defendant's grant was not authorised (I mean as between himself and his employer), to trespass on any adjoining lands, and if he did so, it must be shewn that it was done by the direction, and with the knowledge of the Defendant.

The Complainant says—"I received information from various "parties that the Defendant had been cutting shingles on ungranted "Crown Lands, in Araqua Creek." Again,—"The manager, (mean-"ing the Defendant's manager) informed me that he had received "instructions from the Defendant to cut across the line, as the "wallaba on the grant was quite exhausted, and that he (the "Defendant) was going to take out a new grant," Again,—"The "manager told me three times, that he had received orders to cut "across the line." The witness Blucher says—"The manager said "that he had informed the Defendant that there was no more "wallaba on the Defendant's grant, and that the Defendant told "him (the manager) to cut on Crown Lands." That evidence, I may observe, is expressly contradicted by the manager himself. I do not, however, feel called on to go into the question of the weight or effect of the evidence. It would be quite enough to avoid the proceedings that this hearsay evidence of the Complainant and Blucher was received by the Magistrate and adopted by him, so as to be found on the depositions; and I think, this would be so even, if there were independent evidence, or presumption of the Defendant's responsibility. But in this case, unless the manager's act could be held, itself, to entail this responsibility on his employer, this inadmissable hearsay evidence is absolutely the only evidence against him.

I think it right to point out in disposing of this case, a matter which very often occurs in Review cases, and which I have repeatedly commented on, but which occurs in this case to an extent greater than I have ever noticed before, viz., the inaccuracy in the copies of the proceedings furnished by the Magistrate to the parties and to this Court. Accuracy in such matters is exceedingly simple, though it may, perhaps, appear irksome to adopt without efficient assistance, the simple means of securing it. Perhaps my own personal feeling would lead me rather to over-estimate, than to under-estimate its irksomeness. But even if it were far more irksome than it is, and as difficult as it is simple, it is an essential part of the Magistrate's duty. It cannot be necessary that I should attempt to point out in detail, how important a part of his duty it is. I will content myself with observing that in this case, there are

variations between the copy of the proceedings furnished the Appellant, and that returned to this Court, in no less than 45 places, which I have caused to be marked on the copy in the Registry, and some *of these* are of considerable importance.

I set aside, and reverse the proceedings and conviction in this case, with costs against the Respondent.

JAMES LOMICK *v.* HENRY UNDERWOOD.

18th March, 1865.

(Ordinances 19 of 1856, and 20 of 1862.)

Clerical error in Conviction.

THIS was an appeal from the decision of Mr. G. W. DES VŒUX, S. J. P., who convicted the Appellant of an assault, committed on the 2nd November, 1865; the date of the conviction being the 28th February, 1865. The complaint and evidence clearly showed that the date on which the offence was committed was the 2nd November, 1864.

BEAUMONT, C. J., reversed the Magistrate's decision, giving judgment as follows:—

This is a case in which the Appellant seeks to have a Review of certain Summary Proceedings, before a Stipendiary Magistrate, in which he has been charged by the Respondent, Underwood, with an assault, and in which he has been convicted and sentenced to imprisonment. Various grounds of Review were alleged, and some of them were opened before me. The only one however in which, I think, the Appellant entitled to succeed in so far as the argument had proceeded before me, is one of the nature of a mere clerical error upon the face of the conviction, which finds the assault to have been committed on the 2nd November, 1864, though apparently, what is called a clerical error, I am of opinion that it is in the case of a Summary Conviction, at this stage, a fatal one. It is one that clearly could not be amended after a formal conviction has been actually returned to the Court of Review, except under some statutory power; and I am not aware of any authority which this Court, or the Magistrate has, to amend the conviction in such a particular, at this stage of the proceedings. If so, it is not necessary that I should point out the serious practical reasons, which would not consist with the conviction remaining in force, as it is on the face of it so inconsistent as to be nugatory, unless it can be read and allowed for as a mistake. But such a mode of reading

a conviction in a criminal case, would plainly be to set at nought every rule which is applicable to them, and, therefore, I have no alternative but to set aside the proceedings and conviction.

I cannot help adding that, it is with great regret, that I have felt bound to come to this conclusion as to the result of a slip of this nature, inasmuch as the case appears, on its merits, as they are disclosed in the depositions returned to the Court, to be one of a serious assault, well meriting the punishment inflicted on the Appellant. As this question is raised in the reasons of Review, I cannot avoid saying that it is quite impossible to accede to the proposition that the proper sentence for such assault is (as was suggested by the Appellant's Counsel), "a moderate fine." It is manifest, and especially where the offenders are persons of substance, that in many cases such a sentence would be a mere farce, and that (although the adjustment of the sentence is a matter peculiarly proper for the Magistrate, and with which this Court would only interfere in rare and exceptional cases), the adoption of such a principle on the part of a Magistrate, would be to surrender to violent persons an important part of the protective authority of the law.

JAMES AMOS *v.* CHARLES W. HALEY.

18th March, 1865.

(Ordinance 22 of 1862.)

Suspicion of stealing Plantains—Plantain-walk enclosed or open—Framing Charges—Discharge of prisoner—Evidence.

THIS was an appeal from the decision of Mr. W. J. JEFFREY, S.J.P. An appeal by Henry Francis, another Defendant in this case, in the Court below, was heard by Beete, J., who expressed his concurrence in the Chief Justice's decision.

BEAUMONT, C. J., gave judgment as follows :—

This is the case of a Review sought by one of three prisoners, and upon hearing it, I intimated that I must reverse the Magistrate's decision. I was on that occasion asked to consider whether some further order was not requisite to secure the prisoner's discharge. I declined to make any such order, on the ground that he was entitled to his discharge without it. Indeed, in the view which I take of the case, he never was legally in custody; and as the Gaoler in all cases of committals by inferior Courts, such as the Stipendiary Magistrates,' acts on his own responsibility, I could not readily suppose that after a conviction had been actually reversed, he would

act so improperly and incur so great a risk, as to detain the prisoner, although in the first instance he might not have examined the conviction, so as to observe its defects. I presume that the Appellant has been discharged from custody, as no application has been made to me, and I now proceed, pursuant to the Ordinance, to give written reasons for my decision, which I have been obliged to postpone in consequence of the state of public business, and the importance of several questions raised in this case.

In the result, however, though some of these questions must be noticed, I think it better to rest my decision only on one of these, which is quite sufficient to avoid the conviction, and which when it is open to the Court, is the fairest ground towards the Appellant, on which to proceed.

In the first place, the whole of these proceedings must be invalid, because there never was any effective or valid charge to sustain the conviction. The charge is one of "suspicion of stealing;" and it is manifest that such a charge could not sustain a Summary Conviction that the Appellant did feloniously steal. Again, it is, at all events, doubtful whether when upon a charge against *three* jointly, *all* of them are convicted; it is lawful for the Magistrate to make three formal convictions. There is, really, but one proceeding and one conviction; and here the Magistrate has drawn up three separate convictions.

Another of the objections urged, was that the Magistrate had exceeded his jurisdiction in sentencing the prisoners to three months' imprisonment for the offence charged, even if it could be treated as a charge of actually stealing, instead of what it is; "on "suspicion of stealing, taking and carrying away," three bunches of plantains, worth 48 cents each.

That sentence could only be sustained by bringing it under one or other of the 31st and 32nd Sections, of Ordinance 22 of 1862—the first of which applies to stealing any plant, root, or vegetable production, growing in any "garden, orchard, pleasure ground, or "nursery ground;" the second, to stealing plantains, yams, &c., "growing in any land, open or enclosed, not being a garden, orchard, "pleasure ground, or nursery ground." The proceedings, however, speak only of "the plantain walk of said place," as it is put in the conviction, or "of said estate," as it is put in the information. They do not shew under which Section the theft, or the "suspected" theft is charged. It might be argued, that as the theft must be understood to have been a theft, either of a vegetable production from a garden, orchard, pleasure ground or nursery, *or* of plantains from some other ground, enclosed, or unenclosed; and inasmuch as the sentence awarded, might be awarded for an offence under either Section, it is not material that it should appear which of the two Sections the Magistrate did act under. But on the other hand, it

was urged, with great force, that there are *two separate statutable offences*, and that the information and conviction ought, as an essential circumstance, of the supposed offence, to have shewn that the plantain walk mentioned, was either a place protected under the 31st Section, or that it was not so, but one falling under the 32nd Section, and not only is there great weight in this argument on general principle, with reference to offences thus created, but moreover though the *immediate* penalty inflicted is within *either* of those Sections, both Sections provide also for an ulterior or aggravated punishment on a second conviction; and as these punishments differ in the two cases, it is plain that, on that ground alone, the proceedings should regularly shew *which* of the two offences is charged against the prisoner. It might, however, be argued that the description of a "plantain walk," though irregular is, itself, explicit enough to shew what is the offence charged. Perhaps it would be sufficient to say that it certainly carries no such meaning to my mind, and that after deliberate consideration, I am unable to say which of the two Sections it is, that the Magistrate has acted under; and I can hardly say that where such documents are not sufficiently explicit to convey to the mind of a Judge of this Court, information as to what is the particular offence of which the Appellant is convicted, they can be deemed sufficiently certain and explicit to be sustained. The view which, were it necessary, I should be prepared, or at least, disposed to adopt on this question is, that these are in effect, two different offences, and that unless *one* of them is alleged and found so as to bring the offender clearly within one Section *or* the other, the case must be considered to stand merely on a charge of stealing plantains, under the general law of petty theft, in which case the Magistrate plainly has exceeded his jurisdiction as to the sentence inflicted; or if the plantains were attached to the freehold, (as would seem) he had acted without any jurisdiction. I prefer, however, as it is not necessary to do so, to give no judicial opinion on this point, and I merely advert to it, as it was raised in argument and as it would shew how important it is that the proceedings in Summary Convictions, should on the face of them, bring the case within the provisions of the particular law under which they are made.

Another objection was, that the plantains are stated to have been the property of Haley, whereas his evidence states that he is *part* proprietor of the Estate to which belongs the plantain walk, and he gave no other evidence of ownership or possession. This objection also seems to be one of great weight. Indeed, I do not see how it could be met, were it necessary to decide formally the point. I may notice that the conviction appears to depart from the charge in a material respect, the charge stating the plantains to be the property of C. W. Haley; the conviction stating the plantains to have been stolen from the "plantain walk of said place, the pro-

"perty of the said C. W. Haley." The property there mentioned, appearing to be the property in the *plantain walk*, which his evidence shews *not* to be the property of C. W. Haley alone.

But the ground on which I rest my decision is this, the only charge against Amos is, that some plantains had been cut and stolen from the plantain walk in question, and that foot marks are said to have been traced from there to his house. But what evidence is there that they were Amos' foot marks? Two other men, Francis and Robertson, are actually charged with Amos, and convicted with him of this supposed theft; and the evidence shews that both of them were at the spot where the foot mark led, when Haley and the Constable went to track them. There is not any evidence of how many foot marks there were, and to which of these three men are these foot marks said to belong. Amos says he bought a bunch of plantains from Robertson; Robertson (whose statement is, however, no evidence either for, or against Amos), confirms this statement, and there the whole case rests as against Amos. At all events, in this state of the evidence, unless the mere fact that a bunch of plantains was bought by Amos from Robertson, can be considered a circumstance of suspicion against Amos, what is there to shew that he was the thief? Nothing, whatever, that I can discover, except certain circumstances of suspicion which were, in my opinion, wrongly admitted in evidence against him. First, it is said that when Haley went to Amos' house, he asked his mother if her son had brought any plantains home, and that she replied that he had been aback to her provision ground and brought a bunch, which she produced, and that then he (Haley) and the Constable, Abrams, went aback and looked about them, and they proceed to undertake to swear, as the result of their observation that no plantains had been cut on Mrs. Amos' provision ground. Now, all this is hearsay of the worst kind. Another circumstance which should not have been admitted in evidence on the charge against Amos, is, that Haley claimed as his property the bunch of plantains which Mrs. Amos produced, and that when he went aback to get the stalks to fit one to it, and while he was away, Robertson cut the plantain bunch to pieces. That may be a circumstance against *Robertson*, but Amos was not present, nor shewn to be in any way connected with Robertson except, that, he admits having bought a bunch of plantains from him. This evidence, therefore, should not have been admitted as against Amos, as I must take it to have been on considering the state of the proceedings before me. At all events, what was said by Amos' mother, and the statement to shew its "falsehood" were wholly inadmissable, and I have no hesitation in saying that their admission clearly invalidates the whole proceedings.

I therefore set aside, and reverse the conviction in this case, with costs against the Respondent.

MOSES WILLIAMS *v.* WILLIAM ROBERTS AND SPENCER CAMBRIDGE

6th May, 1865.

(Ordinance 21 of 1856.)

Reconsideration of application—Vagrancy—Review after dismissal for non-appearance—Functions of Review Court—Entry under claim of right not to be treated as vagrancy—Costs to whom payable.

THIS was an appeal from the decision of Mr. J. D. FRASER, S. J.P. The facts appear in the judgment.

BEAUMONT, C. J., gave judgment as follows :—

This is a case which comes before me, under peculiar circumstances, inasmuch as the Appellant's application in Review has been dismissed for non-appearance, or want of prosecution. Thereupon the Appellant was committed to Gaol by the Magistrate under the conviction in this case, having up to that time been permitted to remain at large, upon depositing $24 with the Magistrate. Being in Gaol, he applies by petition, that the proceedings against him may be reviewed, notwithstanding the order of dismissal, or otherwise, that he may be discharged from custody, on the ground that he is illegally detained.

The conviction was obtained on a charge brought against Williams, signed thus—"S. Cambridge, for W. Roberts;" "for being found on "the premises of W. Roberts for an unlawful purpose, and being "unable to give a satisfactory account of himself, under Ordinance "21 of 1856, Section 5." And thereupon he was sentenced to one month's imprisonment, and to three days' further imprisonment as for non-payment of the sum of 88 cents, which the Magistrate awarded to Spencer Cambridge, for costs.

Upon the Applicant's petition coming in to me, I ordered that the Keeper of the Gaol should produce him before the Review Court, on Saturday, the 6th May, and should then shew the cause of his detention, and also that notice of this petition, and of my order therein, should be given to Mr. Roberts and Mr. Cambridge.

Accordingly the Appellant was produced before me. Mr. Solicitor General appeared upon the petition for Messrs. Roberts and Cambridge, and objected to my proceeding with the case. As the course taken by me has been to Review and quash the proceedings before the Magistrate, I shall only notice the petition in the light of one for such Review, which was its main and primary aspect, the prayer which it contained in the nature of an application for

discharge, or *habeus corpus*, being merely alternative and not having been proceeded on.

But the Solicitor General argued, that it was not open to the Court to re-consider the case in Review, on the ground that the proceedings in Review had been finally dismissed. But to that argument, I was, and am entirely unable to accede. The proceedings in Review had never even been heard, and as the Review Court, whether it has, or whether, as I presume it has not any existence separate from the Supreme Court, is clearly a "Court," and as the office of a Court is "to hear and determine," it is impossible that the dismissal which took place could have been such a dismissal of the case, as to amount to a final sentence.

The function of the Court then, not having been performed, with regard to the proceedings which were regularly brought before it upon Review, I should have had no hesitation, supposing that the order of dismissal had been erroneous or irregular, in treating it as either entirely such, or as such so far as to leave the merits of the case before the Court. And supposing that the true effect of that order, if otherwise valid, had been a final dismissal of the case, it would, in my judgment, clearly be null, for no Court can discharge itself finally of a matter brought within its jurisdiction, except by hearing and determining it.

I apprehend, however, that the order of dismissal instead of being null, or irregular, was perfectly valid, correct and regular, equally consistent with the principles on which the Court is constituted, the practice by which it is guided, and the justice of the case, and this just, *because it does* leave open, and unconcluded the final merits and disposal of the case.

It is perfectly familiar, as a matter of general principle, and plainly requisite according to the usual practice of the Courts of Justice, that short of finally foregoing the decision of the merits of a case before it, without hearing those merits, Courts of Justice regulate their procedure where not regulated for them by rules of order and practice, which are not only essential in a large sense for maintaining the orderly and regular administration of Justice, but which are essential, as all practical Lawyers know, in a more particular sense to secure justice as between the particular suitors. One branch of these rules of practice and procedure, and a branch, no doubt, of great importance; indeed, so important, that the Roman Jurists often placed it in the front of their system, is what they called *De in jus vocando*, which includes amongst its details the requirements of appearance. But important as this branch of of Jurisprudence is, it is only collateral, and subsidiary to the objects of law and of legal procedure, and its bearing and results are qualified accordingly. The results of non-appearance according to the English system are different as they affect plaintiffs and

Defendants. Non-appearance entitles the plaintiff, subject to various rules and restrictions for securing justice to the Defendants, to the sentence which he seeks in some cases as by confession, or in others upon evidence offered *ex parte*. As regards Plaintiffs, the result is different, the ordinary result is, a non-suit or its equivalent, and though sometimes, such sentence or judgment is final as to the particular proceeding, I know of no case in which that is so, except where the Plaintiff may again proceed *de novo*. In all other cases which I am aware of, it is the practice; it is clearly within the jurisdiction, and (where another course would finally preclude the rights of the Plaintiff on the matter in litigation), it is equally clearly the duty of a Court to waive the judgment, order, dismissal, abatement, or non-suit, which has supervened from non-appearance, though it is accustomed to do so only upon such terms and conditions as may do justice between the parties. All this seems to follow plainly and clearly the primary law that the duty of a Court is to hear and determine, taken in connection with the subsidiary principle that it may, within certain limits define and regulate the mode and condition of hearing. In cases where the parties proceed by formal pleadings by way of *litis contestatio* and approach the hearing upon issues joined, and with days and times fixed by the settled and formal practice of the Court, for each step, there might be a great deal to be said in favor of a dismissal for non-appearance being final. Yet I am greatly mistaken if any case can be found in which a dismissal for non-appearance by a Plaintiff would be final, except in cases where the Plaintiff is really interposing to interfere with, disturb, or arrest in its course the *primâ facie* right, possession, or action of the nominal Defendant. In cases of that nature, justice would require that which incidentally follows, viz., that the interference which the suit occasions ceases with the abatement, or discontinuance of the suit itself.

But considerations which apply to proceedings of the nature of such formal suits have little in common with a case of this nature. This is a case in which the Appellant's liberty is interfered with by process of a criminal nature. He says that that process is illegal, the law has given to him a mode of testing that by having the proceedings reviewed by this Court, it is the office of this Court to review them, and that office has not been finally performed until they have been reviewed, and their merits "heard and "determined." It is at the same time, the right and duty of this Court to adopt and act on a settled order and reasonable form of procedure adapted to secure that hearing and determination. Its procedure to this end is certainly of the simplest nature, and if that procedure is not complied with, its action in the final disposal of the Review is suspended. The first condition of that action is, that the case should be brought before it. The Legislature has provided for the *documents* in such cases being returned to the

Court, the practice of the Court regulates with great—perhaps too great—simplicity the mode in which *the parties* shall be brought before it. It is perfectly plain and settled, that the Applicant must appear to sustain his case, that is a necessary condition adopted by all Courts on all occasions. Essential to the proper action of Courts, evidently essential to any "hearing," hearing being the first duty of every Court, a most important condition to prevent the Court being trifled with and imposed upon, and to secure the jurisdiction, from falling into hopeless confusion. It seems to have been thought that there was at one time in the case of these proceedings in Review, some departure from this universal practice, or at least some uncertainty about it, though on what grounds or principle, I own it would be rather strange to discover. But as the result of repeated investigation, I believe that departure did not really exist nor did any uncertainty as to the principle or rule of practice, but that there was some uncertainty as to the application of that rule, an uncertainty which is by no means strange, considering the nature and condition of the jurisdiction. It has, however, been settled for some time past, after consultation amongst the Judges, that this principle should be uniformly acted upon. I believe this has been done, and measures have long since been taken to call this settled practice to the Magistrates' attention, so that they might not fail to perform what is clearly their duty, viz., to give the Appellants in Review, who are often people not only of very small means, but of very small knowledge, and out of the reach of legal advice, every reasonable assistance in furtherance of their intention to appeal and to that end at the least to inform them that they must appear or take measures to be represented in support of their appeal.

This being the settled and reasonable practice of the Court, the Appellant Williams did not appear; his case was not at first dismissed, but stood over until another sitting. It was then again called, and there was again no appearance. I entertain no doubt that it was then the duty of the Court to pursue the established practice, and to make an order, dismissing the Review, on the ground of *non-appearance*, and entirely without reference to the merits. That the Court could assume to decide such cases in privacy, or to give written opinions upon written paper without any security that there is at the time a real contest between real parties would be a most unreasonable, unseemly, and more than this, in my judgment, an illegal proceeding.

In my own experience, many of these Reviews are not proceeded with by the parties because, as I presume, and as must beyond a doubt often be the case, the Appellant and Respondent have settled their difficulties, or have cooled upon their quarrel. Could anything be more improper, than for this Court to go through the farce of solemnly pronouncing a judgment, which might involve

serious questions of law or conduct, upon certain documents before it, and in the presence of the Marshal and Registrar, or still worse, in the face of the public, when the parties seeking that judgment, had compromised matters between themselves. Of such a proceeding it might well be said, "*Fabula non judicum hoc est in "scend non in foro exagitur*," and indeed if such a practice were adopted, this Court would degenerate into a mischievous sham; it would cease to be a Court, and would become a theatre without an audience, or a lecture room without pupils. Such a result would be a just retribution for disregarding the true nature of its jurisprudence and the true guide to its precedure.

Nor is it because there may be cases in which this rule of practice may be a bar to a Review, that it is any less a wholesome or legitimate rule. Every rule of practice, may, and does occasionally, operate to prevent what would otherwise be a right or a privilege. The conditions imposed by the Statute Law for this very procedure, such conditions, for example, as that requiring the payment of a fee of $5, operate in particular cases as such a bar. Such bars are interposed occasionally, to every the most sacred and important rights of individuals, where the just policy of the law and the just rules of society require it. Indeed, this is implied in the very idea of law or rule; the condition of which is uniformity and regularity of principle and practice applied to the endless, varied and inconsistent congeries of events and cases which occur to human nature. I make this observation merely in passing, because it is quite enough for me, or for any Judge on the Bench, to know what the law is, without being too much concerned with its possible effects.

But the reasonableness and regularity of the order of dismissal is no reason why its proper effect should be extended so as to make the Court *functus officio;* on the contrary, as I have before said, if being valid, it would have that effect, it must clearly be a *nullity* as the Court cannot have finally discharged its office without hearing and determining the case. It is to be observed that this is a jurisdiction, and a case in which the Court can only perform its office upon the one proceeding. If I could say to the Appellant, "*bring another Review*," that might be a very good reason for holding that this sentence was the effect of a non-suit duly recorded; but, as I cannot, the proper effect to be given to the sentence is to dispose of the case, unless the Appellant can shew good reason according to the well-known principles applicable to such cases for being relieved from its effect. It says to the Respondents, "as the "Appellant is not here, you need not trouble yourselves to come any "more, and as the Appellant has brought you here uselessly, he "must pay your costs." It says to the Appellant, "you having "disregarded the course prescribed for your case to be heard, are "out of Court." Both parties "go without a say." But that does not prevent the Appellant coming here on the merits if he can

shew that he did not really abandon his case, but was misled, or ignorant under excusable circumstances, that he has merits which he insists upon being entered upon, and that he is prepared to submit to any reasonable conditions for placing the Respondents in the same position as if he had duly proceeded. It appears to me, quite impossible to give it such an effect, consistently with any principles of jurisprudence, or of justice known to me.

If, indeed, the Legislature had prescribed a given mode of procedure in such terms as to make his non-appearance a condition of his obtaining a Review, so as to preclude the Court except on that condition, from exercising or applying its judicial action to the case, that would be another matter; the Court would then be charged to hear and determine *sub modo*, and if the prescribed mode were not followed, the office of the Court would not attach. That, however, is not the case here; on the contrary, the Ordinance providing for these cases, expressly authorises the Court to dispense in suitable cases, even with the conditions which are imposed as to the time and mode of proceeding in Review. If it were necessary to look for such anology, I have no doubt that this express authority to modify the provisions of the Legislature with regard to procedure would itself support the view which I entertain no doubt of on other grounds that, as to matters of procedure within its general and inherent jurisdiction, the Court can waive or modify them until it has heard and determined the case.

Mr. Solicitor General argued, however, that this was not a proper case to be reviewed, because it might prejudice third parties, instancing the position of the Gaoler in particular. It does so happen, that in this case the Appellant was not actually committed until after the Review was dismissed, and I should certainly have made it a condition of re-hearing the case, that the Appellant should bring no action against the Gaoler, had I been satisfied that his position as such would be prejudiced by any order in this case, and if I had the power to do so. I am not, however, as at present advised, of opinion, he will be so prejudiced; and it has, I regret to say, been decided that the Court has no inherent power to impose terms on an Applicant, even to its discretion; and therefore I should be debarred from taking this course. Moreover, the Keeper of the Gaol is not a party to the proceedings in Review. He holds a public office with the immunities and responsibilities belonging to it, and while I am not inclined to retrench his immunities, I am not at all inclined to relax his responsibilities which form one of the most important and peculiar safeguards of society. It would be idle to suppose that in acting on this conviction, he acted on, or noticed, or perhaps even knew of the dismissal of the Review. As to the other parties, they were certainly in no worse a position than if the Review had not been brought. It was no forbearance on their part that led to execution being delayed, and I don't think

they are entitled to anything more than such protection as the letter of the law may give them; and at all events, if the law does not allow me to put an Applicant upon terms, it clearly would be a monstrous and illegal act to refuse justice to the Appellant, because it might have the effect of making other parties responsible for proceedings which, *ex hypothesi*, are illegal.

I therefore have felt myself at liberty, and bound to entertain the petition. The Petitioner alleges that he was not aware that he would have to attend the Review Court without having notice to do so; and on this, he claims to be absolved from the consequence of his non-attendance. I consider this ample ground for granting his prayer to be allowed now to proceed in Review. I have felt, indeed, some difficulty arising from the fact that such statement is not properly verified, and I am not sure that the course which was taken on the subject, was altogether so satisfactory as a more regular one would have been. In the absence of any affidavit, I hesitated, however, to allow the Applicant to be sworn and to verify this fact *viva voce*, unless required by the Respondent. I did so, because it is an unusual course, and I put it to the Respondent's Counsel whether he did require the Appellant's oath. This he did not do, but rested his case so far on the fact, that he had not the opportunity of producing evidence to the contrary. To that, I felt myself unable to give any weight. Notice of the petition was served at Mr. Roberts' store, Georgetown, about mid-day on the 5th of May, and on Cambridge, at Vigilance, about 9 or 10, a.m., on that day. The Petitioner was not called on till past One o'Clock, on the 6th of May. Cambridge and Roberts were both then in Court. Cambridge at least was present in the Magistrate's Court when the case was heard. I feel no doubt that, under such circumstances the Respondents were not in a case affecting the Appellant's liberty, entitled to further time, in order to give evidence on this point, in contradiction to the Appellant's statement; and taking it, that his own oath was waived by the Respondent's Counsel, I considered myself fully at liberty to exercise my discretion in favor of the Appellant.

I consider further, that the resistance to the petition, considering the nature of the case, and the position of the parties, was a harsh and uncalled for step, and one which appears to me only the more harsh and uncalled for, as the Respondents did not attempt, or appear to sustain the conviction which they had obtained.

This conviction cannot stand. It is, indeed, much to be regretted that the parties in the position of the Respondents should have sought for, or obtained it. The Ordinance under which it purports to be made, is one applying to offences of purely a criminal type. It requires no discussion, but a mere glance at the Ordinance under which it proceeds, to see that it was never intended to apply, and cannot reasonably be held to apply, to a case of trespass.

The various offences grouped under the 5th Section, are all offences which the law constitutes and punishes as acts of, not only a criminal nature, but as more or less, approaching felony, or an attempt at felony, or fraudulent or disgraceful misdemeanor. It requires no comment to point out how wisely such offences differ from cases of trespass, even trespass *vi-et-armis*. Proceedings for trespass are by no means unknown in the Magistrates' Courts; on the contrary, they are very common, and it is therefore, the more to be regretted to find the Complainants in this case resorting to the Section in question.

Now, the evidence shews that this was clearly a case of trespass, if anything. The property which the prisoner is alleged with having been upon, for an unlawful purpose, had been his own. It is said that it had been sold to Mr. Roberts, at execution, but it is plain that the prisoner intended to dispute the effect, or legality of that sale. I do not propose to enquire into that question at all. If the Complainants had desired to make out a case of trespass, they should have brought such a charge, and it might thereupon have been competent to the Magistrate to consider whether the claim of title was *bonâ fide*, or merely colorable; or in case of breach of the peace such a charge might have been proceeded on without reference to the clause of title. Williams' entry on the property was, indeed, clearly made on the *footing* of title. He goes in, apparently without breaking any external fastening or enclosure, and proceeds to put up a notice, warning trespassers from the place. It appears to me, I must say, very lamentable to find him for so doing, charged and convicted of having been on this property for an unlawful purpose, and not giving a satisfactory account of himself, under the provisions of Section 5, of Ordinance 21 of 1856.

There are other points of a comparatively formal, though important nature, and which I might observe, but I shall only notice one remarkable one. On the face of the conviction it is stated, that Spencer Cambridge is the Complainant, and the sum of 88 cents is awarded to him for costs; and the Magistrate (stating that it had been made to appear to him, that Williams had no goods whereon to levy distress for these costs), adjudged that he be imprisoned for the additional term of three days, unless they are paid. I only notice in passing, that it is observable that this sentence does not accord with the memorandum under the Magistrate's hand of his adjudication. But what I wish to notice especially is, that I know no authority by which such costs could be given to Cambridge. He was not the Complainant; he was the Complainant "for W. Roberts." And assuming that there is no objection to a charge so laid, and passing over all questions of departure, or variance between the charge and the conviction, it is clear that the Complainant is *Roberts*, and the award of costs should

be to *him*. The result of the course taken in this case would be to give rise to an unauthorised class of *quasi* legal practitioners, and to accord to them a privilege which no professional men possess, of having their costs provided for by an order of the Court against the adverse party. In this case it has made it necessary to serve both Cambridge and Roberts with notices of these proceedings, and this may suffice to shew, in this particular instance how unreasonable, as well as illegal, such a practice is.

I have therefore to set aside, and quash the proceedings and conviction in this matter. I have done so without costs, owing to the circumstances under which the case comes now before me. Though the Appellant suffers, he suffers for a non-observance, which though not otherwise culpable, might have been avoided by a very little care or enquiry, of the very simple rules of procedure in this Court. He has had the full benefit which I ought to give him of the circumstances of his actual ignorance, in the reversal of the proceedings at this stage, and *non obstante* my former order. Had Roberts and Cambridge appeared to sustain the conviction, I, probably, should have awarded costs to them, as I think they would have shewn an improper and culpable persistence in their hardship towards the Appellant in doing so. But as they do not appear in the Review to sustain the conviction, and as I give them no costs of their appearance on the Appellant's petition, I think, that I ought not, under the circumstances of the case, to order them to pay the costs of the Review.

MANOEL PINTO PISTANO *v.* DONALD YOUNG, DISTRICT COMMISSARY OF TAXATION.

13*th May*, 1865.

(Ordinances 14 of 1855, and 8 of 1858.)

Possession of Rum without Permit—Condemnation of Rum and casks.

THIS was an appeal from an order made by Mr. W. HUMPHREYS, S. J. P. The facts appear in the judgment.

BEETE, J., gave judgment as follows:—

The Appellant in this case was charged by Mr. Young, District Commissary of Taxation, Division 1, County Essequebo, "for having "had illegally in his possession, in his Retail Spirit Shop, at the "Parish of St. John, County of Essequebo, a quantity of Rum, to "wit, Twenty-four gallons, without having a permit for the same."

The Magistrate, after hearing the case, made an order of condemnation of the Twenty-four gallons of Rum seized, and also of the casks containing the same, stating "that such condemnation "was according to the provisions of the aforesaid Ordinance"—that being Ordinance 14 of 1855.

At the foot of this order, he put a memorandum as follows—"The "Defendant Manoel Pinto Pistano, is sentenced to pay a fine of "$48, and the costs of the Complainant, 76 cents, and further to "pay the sum of $24, being the sum of $1 for each gallon of Rum "forfeited; in default of payment, the same to be levied by distress "and sale of the goods and chattels of the said Manoel Pinto "Pistano, and in default of sufficient distress, Defendant to be "imprisoned for 30 days, with hard labor." He subsequently made out and attached to the proceedings, a formal conviction, setting out the charges above recited.

It appears to me to be clear, that neither the order of condemnation, nor the memorandum, nor the conviction, can be upheld. In the first place the charge is bad, inasmuch as by no Section of Ordinance 14 of 1855, is there any obligation imposed on a Licenced Retail Spirit Dealer to have a permit for Rum in his possession, nor is any penalty imposed for not having such a permit, a permit is required for the removal of Rum and the absence of it, or the removal of Rum, contrary to the provisions of that Ordinance, renders the Rum itself and "every cart, waggon, boat, vessel, or "other conveyance, and every animal employed in such removal," liable to forfeiture; but the Ordinance makes no mention of the casks.

The order of condemnation is bad, inasmuch as it recites that the 24 gallons of Rum, together with the cask containing the same, were duly seized by the Complainant, under and by virtue of Ordinance No. 14 of 1855; and then goes on to state that, the said 24 gallons of Rum and also the casks containing the same are duly condemned by the Magistrate, in terms of the same Ordinance.

I find no authority given by the Ordinance relied upon, either to the Commissary of Taxation to seize, or to the Magistrate to condemn, the casks in which Rum liable to forfeiture, may be contained.

The only case in which the casks containing Rum are liable to seizure and condemnation is, when Rum is seized for not being of proper strength, under the provisions of Ordinance No. 8 of 1858. There is nothing in the evidence, or in any part of the proceedings, to explain why the Commissary of Taxation, seized exactly 24 gallons of Rum; if entitled to seize any at all, why should it be just 24 gallons? Why not 30 or the whole 37? Surely there is, or ought to be some rule to regulate seizures of this nature, and it

is not, or ought not to be left to the arbitrary will of the seizing officer.

The memorandum of judgment, or sentence against the Appellant, I look upon as merged in the conviction, and the latter is clearly bad, as it specifies as an offence the possession of the 24 gallons of Rum, seized without having any permit for the same; and this I have already pointed out to be no offence under the Ordinance.

Under these circumstances, the whole proceedings from the very commencement are bad in law, and must be quashed.

SIMON KING *v.* MURRAY BAPTIST.

13th May, 1865.

(Ordinance 20 of 1856.)

False pretences—Excess of jurisdiction.

THIS was an appeal from the decision of Mr. J. D. FRASER, S.J.P. The facts are sufficiently indicated in the judgment.

BEETE, J., gave judgment as follows:—

The Appellant in this case is charged with "fraudulently obtaining and carrying away from the Pound, in Victoria Village, on the 6th of September, 1864, a Sheep, value $7, the property of the Complainant, which said Sheep was there impounded."

After hearing evidence in support of the charge, and also on behalf of the Appellant, the reading of which certainly altogether fails to establish, to my mind, the guilt of the Appellant, the Magistrate has found him guilty, and sentenced him to pay a penalty, or in default to be imprisoned with hard labor.

The principal evidence is that of the Complainant and his brother, on one side, and that of the Appellant and his brother on the other; and I think it anything but clear, that the Appellant when taking the Sheep out of the Pound, as his own, was making a false or fraudulent representation, knowing the same to be false and fraudulent. There was nothing in the circumstances from which fraud was to be inferred. The Sheep was kept tied for six days after it was taken from the Pound, in Appellant's yard, where it could be seen from the Railway, and from the Middle-walk. Again, when the Sheep was sold to Brocket Hylis, and he was about to alter the mark, the Appellant advised him not to do so, thus, leaving the Sheep to be recognised by its proper owner. Supposing him, the Appellant, to be mistaken in claiming it, or to have claimed it, knowing it not to be his property; whereas if the,

mark had been altered, there would have been no longer any danger of detection.

Looking at all the evidence, I certainly should not have felt warranted in convicting the Appellant; but although, my opinion is, that the case was so doubtful as to entitle the accused to an acquittal, it is not on that ground that I quash the conviction.

The conviction expresses on its face, that it is under Ordinance 20 of 1856, and by the 2nd Section of that Ordinance, the punishment for the offence with which the Appellant was charged, is fixed at imprisonment, with or without hard labor, not exceeding 30 days, or a penalty of $24, or to both those punishments together.

The Magistrate has sentenced the Appellant to forfeit and pay the sum of $24, including costs, and in default of payment, to be imprisoned in the Gaol of Georgetown, with hard labour, for two calendar months. This is manifestly an excess of jurisdiction, and renders the conviction wholly bad.

This objection was not raised at the hearing of the Review, but being patent on the face of the conviction, I am bound to notice it.

MANOEL GONSALVES PEQUENO *v.* EDWARD WEDDALL.

27th May, 1865.

(Ordinance 15 of 1850.)

Construction of Ordinance—Allowing riotous assemblage.

THIS was an appeal from the decision of Mr. H. P. PLUMMER, S.J.P. who convicted and sentenced the Appellant, a Retail Spirit Shopkeeper, on the charge set out in the judgment. Ordinance 15 of 1850 has been repealed by Ordinance 25 of 1868, but Section 49 of the later Ordinance is much to the same effect as Section 35 of the former.

BEAUMONT, C. J., gave judgment as follows :—

In this case, I think the conviction must be set aside. The charge is, that the Defendant "allowed a disorderly assemblage to "congregate in, at, or about his shop, he being a Retail Spirit "Dealer." A number of objections are introduced by the written reasons, some formal, and some substantial. I set aside the conviction on two grounds of objection, that the charge does not duly state a legal offence, and that there is no evidence to sustain the charge.

The Section under which the charge is preferred, is certainly a

somewhat puzzling one; it is Section 35, of Ordinance No. 15 of 1850, which runs thus—"And be it enacted, that the keeper of "each and every such Licenced Retail Shop, shall prevent any "riotous or disorderly meeting, or assembly of persons in, at, or "about his shop, and on such persons refusing to disperse on being "warned by him, he shall immediately give, or send notice thereof "to the Policeman or Constable nearest to him, and call upon him "for assistance, on pain of forfeiting and paying for the first "offence, a sum not less than Ten Dollars, and not exceeding "Twenty-three Dollars; and for the second and every subsequent "offence, the sum of Forty-eight Dollars."

It commences with directing every Retail Dealer to prevent such assemblies as that charged against the Defendant; and the meaning which the Magistrate has, I presume, attributed to him would seem to be, that he shall not "allow" such assemblages. That is probably its effect. He can hardly be held by a penal clause, punishable for what he cannot prevent; but he is bound not to permit what he can prevent.

That it is certainly doubtful whether even in this case, the charge should be stated in this way. The *effect* of the law is a matter for argument: the *charge* should be of an offence which is *in terms*, a clear offence against the law.

Now, comes this question; is the penalty imposed by this Section, imposed as a breach of this requirement, or is not this merely a general enactment, (which really would be merely "declatory") followed up by the requirement under penalty of a specific act, the calling of the Police?

I feel some difficulty about it, but on the whole, I think the true meaning is merely, that, if he does not call the Police, the Shop-keeper is then liable to the penalty. This seems the best reading of the Section, the most grammatical, and also the most reasonable, remembering that the first clause surely declares the law. For, indeed, every one is bound to prevent as far as he reasonably can, such disorderly assemblies in, at, or about his house, so that if he permits them in any legal sense, he may be indicted. To read the word "and" as coupling his obligation to prevent the assemblage, and that to call the Police as one obligation, the breach of which is made penal, would be repugnant. To read it "or," so as to make them two obligations, the breach of either of which is penal, would be to change the word. The third mode of construction is that which appears to me the right one, states the first clause as declaring the general law, and then to proceed to the further enactment, introduced by the word "and," which directs the Police to be called, and imposes a penalty for failure to do this.

If this be the true reading of the Section, the information cannot be held to charge correctly, the offence of not calling the aid of

the Police. But taking the charge either way, there is no evidence, as I think, on which to convict Pequeno. There is none certainly that he allowed these assemblies, in any ordinary or direct sense; and so far as I can see from the evidence, he is no more responsible for having failed to prevent it, than any of the Police whose duty it was to do so.

He was not at, or near the shop at the time, and I do not think that anything appears to shew that by any authority or sanction of his, he encouraged or connived at it.

As to his not calling the Police, it is enough to say that, while he *was not*, several of the Police *were* on the spot, and were themselves wholly unable to stop the disturbance till it wore itself out.

The Magistrate, indeed, adds in a note, that the shopman was unable to do so. The Police were there in some force, and as far as appears, it was a case for him to deal with. I do not see that the man Pequeno could have done more if he had been on the spot in time to maintain, or employ an army of his own, and to enter upon this "scrimmage" would perhaps have been the worst thing possible.

I quite understand, that it may have been thought desirable to stimulate Mr. Pequeno to do what he could to prevent such disturbances; but still it is not clear, I think, that he is open to a conviction upon the Section in question. If it is thought that he can be made to encourage the disorderly scenes which are said to have taken place, and so on, perhaps the best course will be to indict him.

RAMSAY ROGERS *v.* MANOEL GONSALVES PEQUENO.

17th June, 1865.

(Ordinance 33 of 1850.)

Trespass—Bonâ fide claim of right of entry.

THIS was an appeal from the decision of Mr. J. D. FRASER, S. J. P. The case turned on an alleged dispute as to the title to the land said to have been trespassed on.

BEAUMONT, C.J., gave judgment as follows:—

In this case the Appellant has been convicted under the Trespass Ordinance, for trespassing on the premises of one M. G. Pequeno.

The premises are not described in the conviction, and this might, probably, have been found a fatal defect, had it been raised by the reasons; and I notice it as the more important in this case, because,

taken in connection with what stands as the charge, this is not only a defect of substantial form, but of very substance.

The document which stands as a sort of charge or complaint, states an illegal entry by the Appellant on a certain "half lot" at Friendship, "with the buildings on it," which the Complainant alleges to be his; but the evidence shows that he had allowed the Appellant to remain on *part* of that half lot, "the premises" which he says the Appellant trespassed on, and thus the general nature of the charge, when taken in connection with the evidence and the conviction, shows that the latter is defective on account of its want of precision.

The point, however, on which the Appellant rests is, that the Magistrate's jurisdiction was ousted, by reason of the title to the property in question being in dispute between the parties. Now, this of course, would oust the jurisdiction of a Magistrate in trespass, unless, at least, the trespass were *vi et armis*, and in breach of the peace. It is, indeed, alleged in the charge in this case, that this trespass was *vi et armis*; but that is neither proved in the evidence nor is it found in the conviction.

The question then is, whether there be any *bonâ fide* dispute of title. I say *bonâ fide*, because of course the Magistrate's jurisdiction cannot be ousted by a mere *sham*, or the bare *assertion* of the Defendant. If it were so, every person brought up for trespass would, as a matter of course, say, "the property is mine;" still—the question for the Magistrate is only of the *bonâ fides* of the claim, and not as to its substance, or even its plausibility. Of the *bonâ fides*, the Magistrate must judge; and the protection of the Defendant is, that the Magistrate will, himself, judge not only *bonâ fide*, but reasonably, and under a responsibility quite sufficiently weighty; for if he errs in these respects, he becomes, himself, a trespasser, and unprotected in the assumption of a jurisdiction which does not belong to him.

The Complainant's own evidence, however, shews circumstances which seem to establish that there is a *bonâ fide* claim on the part of the Defendant; for it appears by the Complainant's shewing that the property was formerly the Defendant's; was sold at Execution Sale, was levied on by the Marshal, and delivered by him to the Complainant as a purchaser. Now, sitting in this Court on this case, it is not for me to express any opinion on the weight or merits of the question, which appears to me open, as to how far a purchaser of land at Execution Sale, can maintain the right to possession against the former owner before Letters of Decree are obtained. For it is evident from this case, and from another which has been before me, that, in the cases of these Friendship properties, the purchasers sometimes take the possession from the Marshal without obtaining Letters of Decree. This they may of course do,

but they do so at their own risk. The law asserts the Marshal's possession as its own, and will not allow it to be disturbed; but when the Marshal has gone out, the right to possession may become again a question of title.

Now, whether Rogers' right before the levy was by transport, or merely possessory, he may say that when the Marshal went out of possession, he was remitted to it, and that, as the purchaser has no Letters of Decree, and especially as he, himself, has never been out of actual possession altogether, his title is as good as, or better than the purchaser's. And if arguing thus, or being *entitled* to argue thus, he retained, or even peaceably re-takes possession, and justifies his doing so by asserting title, is this so clearly *mala fide*, as to constitute him a trespasser? I think it cannot be so said. It is no question of *the result* of whether on an action to try the right to possession, one or the other will be more likely to succeed. The Magistrate may very usefully, in some cases, exercise his influence in pacifying and settling disputes on such grounds, but it is clear that neither he, nor the Judge in Review, has anything to do with the substantial merits of the claim, if he sees that there are circumstances which may give rise to its being made *bonâ fide*.

I have felt a little difficulty in deciding whether the evidence clearly shews that the house on which the Defendant is said to have trespassed, is, or is not on the "half lot," which the evidence shews was dealt with as I have stated. But on careful consideration, I think that the "lot" which it is said to be on, appears sufficiently to be (as no doubt it is in fact) the "half lot" spoken of in other parts of the evidence, and in the charge. On this ground, therefore, the conviction must be reversed; but I ought not to overlook the defects of the charge. Clearly it is not a good charge; or complaint of any penal offence. It is in form, a sort of petition, stating certain facts as to the Complainant's purchase and the Defendant's taking possession; and then it proceeds thus—

"And that the said Ramsay Rogers, still holds illegal possession "of the premises and buildings, and refuses to pay any rent, or give "me legal possession of the said half lots, No. 35, &c., and buildings "thereon situate. I therefore pray for redress."

"PETER J. SAVORY,

"Agent for M. G. Pequeno."

Now, without alluding to the mode in which it is signed, its terms leaves it quite uncertain whether the Complainant wishes the Magistrate to make the Defendant give him possession, or pay rent, or to punish him penally. Moreover, as the statement of the refusal to pay rent, implies a demand of rent, that of itself would seem so far a sanction of the Defendant's possession, as to put an end to a claim of trespass.

MANOEL GOMES DE SILVA *v.* A RANKIN.

6th January, 1866.

(Ordinance 20 of 1856.)

Fraudulent possession—Evidence—Practice.

THIS was an appeal from a decision of Mr. J. D. FRASER, S. J. P., under Section 2, Clause 6 of the Petty Offences Ordinance, which renders punishable any person having in his possession anything which may reasonably be suspected of being stolen, and who shall not give an account how he came by the same, to the satisfaction of the Stipendiary Justice of the Peace.

BEAUMONT, C. J., gave judgment as follows :—

This case was heard before me on the 5th of August last, but my decision has been postponed by reason of circumstances over which I have had no control.

It is the case of a conviction of the Appellant, for having in his possession certain bunches of plantains, supposed to have been stolen, without giving a good account of the same. The main question is one of evidence; first, as to its sufficiency, and secondly, as to its proper reception, or, as I should rather say, procurement.

As to the sufficiency of evidence to sustain the conviction, I think there is evidence to justify the Magistrate, as having drawn the conclusion which he did. It is not for the Judge in Review to interfere with that conclusion, because he might not have drawn the same. At the same time, I think it right to say that charges of this kind are very easily, and sometimes very lightly made, and that the same considerations which would make this Court loath to set aside a Magistrate's conclusions of fact upon such a charge, may make it proper for him to be, even more than ordinarily careful to guard against the ready adoption of charges which may often be made on light grounds, and on a somewhat arbitrary spirit.

I am led to make this remark, because the evidence being contradictory and doubtful throughout, the Magistrate seems to have found himself unable to decide upon it, as brought before him. Probably, the more proper course would have been in such case to acquit the Appellant. I am not, indeed, at all disposed to restrict the legitimate discretion of a Magistrate in the conduct of cases before him, but here the prosecutor has closed his case, and was not entitled after the evidence for the defence to strengthen it, except upon some casual and unforeseen point. The point here in doubt, however, was the very main issue. Whether the plantains

in question had been cut on the Appellant's land, and on this point the Magistrate not being, as I must conclude, able to decide in favor of the prosecution, after hearing the defence, sends to procure further evidence. He sends a Policeman with the accused (apparently as a prisoner) to the bed, and with him he sends a man, whom he names, one Pretty Gordon, to confront, as I may say, the accused, and to depose to the result. Now, that was, at the best, a very doubtful and undesirable proceeding, but perhaps its most objectionable feature is this, that, as I infer from the record, the Magistrate in effect delegated to the man Gordon on a view of the spot, and confrontation with the accused the determination of a serious issue of fact, which was to be determined by the Magistrate himself. It is quite true, that he puts Gordon to his oath afterwards, but on the whole, it is to me evident that, being himself doubtful on the question of fact, he in effect referred it to the determination of his nominee, Gordon, under the mode I have mentioned.

No doubt this was perfectly well intentioned; but I think it was a mistake—such a mistake as to render the reception of Gordon's evidence then, and so acquired and given, improper. And on this ground, I reverse the conviction with costs.

ANTHONY EVANS *v.* YONG-AH-SAM.

26th August, 1865.

(Ordinances 19 of 1856, and 20 of 1862.)

Assault and battery—Averring more than one offence in one charge—Evidence—Power of Magistrate to prove jurisdiction after case closed.

THIS was an appeal from a decision of Mr. H. P. PLUMMER, S.J.P. The facts were simply that the Appellant, a Driver at Plantation *Blankenburg* had assaulted the Respondent.

SMITH, C.J., gave judgment as follows:—

In this case, a Review of the proceedings was sought upon several grounds, which I shall proceed to examine in the order in which they were urged.

1. In the first place, it was objected that the charge was bad, inasmuch as it was for two offences; and the 14th Section of Ordinance No. 19 of 1856, which enacts that every complaint "shall be for one matter of complaint only, and not for two or "more offences," was relied upon in support of the objection. The charge is, that the Defendant "did, on the Eleventh day of May, "1865, unlawfully assault and beat the said Yong-Ah-Sam, at

" Plantation *Blankenburg*, Parish of St. Luke, County of Demerary," and I am of opinion that the assault and battery complained of, formed but one matter of complaint. A similar question arose in England in the case of Regina *v.* Scott, 33, Law Journal, (N. S.) Mag. Cas. 15, upon the corresponding clause in Jervis's Act.

In that case the Defendant was convicted of uttering twenty consecutive oaths, for which he was fined two shillings, and a cumulative penalty of £2 imposed. It was objected that the complaint improperly charged several offences, in respect of each of which a distinct penalty had been imposed, and that this was contrary to the Act. The point was fully considered by the Court of Queen's Bench, and was over-ruled. The ground of the decision is thus concisely stated by Blackburn, J.—" As to Jervis's Act, I " quite agree with my brother Wightman, that it applies to one " ground of complaint, and there is here but one ground of com- " plaint, and that was, that the Defendant swore several oaths, on " one and the same occasion." So in the present case, I think there is but one ground of complaint, and that is, that on a particular day the Defendant committed an assault and battery upon the Complainant. It is true, that there may be an assault without a battery, but there cannot be a battery without an assault; and even if the Complainant had failed to prove a battery, that would not excuse him from so much of the complaint as charged an assault.

The Rule is thus laid down by the Queen's Bench, in Rex *v.* Hollingburg, 4 B & C. 330.—" In Criminal Cases it is sufficient for the " Prosecutor to prove so much of the charge as constitutes an " offence punishable by law."

2. It was next objected that the Magistrate after taking a certain amount of evidence on the part of the Complainant, had no right to say, that he did not consider it necessary to examine further witnesses in support of the prosecution. No authority was cited for this objection, and I am unable to see on what ground a Defendant can complain that additional evidence was not taken against him. He had an opportunity of giving all the evidence that he chose to tender in support of his defence; and it does not lie in his mouth to complain that the Magistrate did not take more evidence against him, than that which he was called upon to answer.

3. The third objection was, that the Magistrate had no right to take evidence to prove jurisdiction, after the Complainant's case had been closed; but I am of opinion that if the Defendant had wished to raise the question of jurisdiction, he should have done so in the first instance, and that after the case had been gone into on the merits, the Magistrate exercised a proper discretion in dealing as he did, with an objection of this purely technical character.

4. Lastly, various objections of a formal nature were taken to

the conviction; but these, I have no hesitation in over-ruling. Whether an application for Review is the proper proceeding to obtain upon merely technical grounds, the quashing of a conviction, I forbear to express an opinion on the present occasion, inasmuch as it is unnecessary for me to do so.

It is sufficient that the conviction purports to be for an offence committed, contrary to Ordinance No. 20 of 1862, which enacts (Section 72) that "no Summary Conviction under this Ordinance "shall be quashed for want of form." And in the words of a learned Judge, "there is no rule more wholesome than that which prevents "technical objections from interfering with the administration of "Justice."

Believing, therefore, that the evidence sustains the decision, and that the punishment is one warranted by the law, I think that this Review cannot be sustained.

EVE LEWIS *v.* ELIZABETH FURREY.

16th September, 1865.

(Ordinance 19 of 1856.)

Review—Improper reception of evidence by Magistrate—Order te expunge part of proceedings.

THIS was an appeal from a decision, in which Mr. W. J. JEFFREY, S. J. P., had convicted and sentenced the Appellant for assault. After sentence, however, he took further evidence against the Appellant, and appended such evidence to the proceedings.

SMITH, C.J., gave judgment as follows:—

In this case, it was argued before me, that the Magistrate's decision should be reversed on two grounds; first, that the evidence was not sufficient to support the conviction, and secondly, that the evidence of the Police Constable, Simmons, ought not to have been taken.

With respect to the second ground of objection, I quite agree that the Police Constable's evidence, which was taken after the case had been closed, and sentence passed, must be dismissed from consideration altogether. The Magistrate was, at the time *functus officio*, and no evidence irregularly appended to the proceedings after adjudication, can be allowed to affect the case in the slightest degree, or to prejudice either party. I therefore, wholly discord

the Policeman's testimony, and the question remains, whether upon the evidence, as duly given, there is sufficient to support the conviction.

The case is, certainly, rather meagre, but the Complainant swore positively to an assault and battery having been committed on her by the Defendant, (now Applicant for Review) and she exhibited to the Magistrate, marks of a severe beating. The evidence of the Coolie watchman, who was called for the defence, does not really amount to a contradiction, for after the commencement of the quarrel between the two women, he states that he went away, and did not see what happened. But even, if there was a conflict of testimony, it is the province of the Magistrate, who, in this respect, exercises the functions of a Jury, to decide as to the credibility of the respective witnesses, who are examined before him, and from whose demeanour and manner of giving their testimony, he must have means of arriving at a conclusion, which the Judge in Review cannot possess. On the whole, I think, that the evidence in this case is sufficient to support the conviction, and I see no reason for disturbing the Magistrate's decision. The application must, therefore, be refused, but as some ground for it was afforded by the irregular course pursued in taking evidence, after sentence had been passed, I shall not award costs against the Applicant. Further, I think it desirable that the irregularity in the proceedings should be corrected, and acting under the 5th Section of Ordinance No. 19 of 1856, which empowers the Judge in Review to correct "pro-" ceedings in cases of Summary Convictions, and orders of the " Stipendiary and Special Justices of the Peace" for " irregularity" in the proceedings, amongst other things, I have added to my judgment, a direction to the Stipendiary Justice, who convicted in this case, to strike out, and expunge from the proceedings the whole of the evidence of Police Constable Simmons; the same having been irregularly taken by him after sentence had been passed.

DAVID SEMPLE *v.* JOHN WILLIAM.

9th September, 1865.

(Ordinances 19 of 1856, and 20 of 1862.)

Aggravated assault—Charge need not be in writing, nor signed—Inadmissible evidence—Form of conviction—Opinion of Magistrate as to age of child, under Section 44, *Ordinance* 20 *of* 1862.

THIS was an appeal from a decision of Mr. PLUMMER, S. J. P. The facts are fully set out in the judgment.

SMITH, C.J., gave judgment as follows :—

In this case, it appears from the evidence, that the Applicant for Review (Defendant in the Court below) is a Schoolmaster, and that suspecting the Complainant, a boy attending his school, of having stolen some money from him, he endeavoured to extort a confession by means of torture; applying to his hands certain instruments, termed in the proceedings "Barbados Gloves," which squeezed his fingers in a cruel manner thereby causing great pain. The facts were fully proved, and the Magistrate rightly considering an assault of this aggravated nature upon a child, to come within the meaning of the 44th Section, of Ordinance No. 20 of 1862, sentenced the Defendant to pay a fine of Ninety-six Dollars, or in default of payment, to imprisonment with hard labour for Six Months. From this decision a Review has been sought, and I shall now proceed to examine the grounds upon which the application is founded. The first is, that the "said John "William never exhibited an information at all, and that the "signature is not the signature of the said John William," and I was applied to for leave to summon witnesses to prove these allegations.

After carefully considering the arguments which were addressed to me in support of the application, I feel bound to refuse it. Under Ordinance No. 19 of 1856, the information need not be in writing, for the 6th Section enacts, that "every information or "complaint, may be either verbal or written, and if verbal, the "Justice of the Peace before whom such information or complaint "shall be made, shall reduce the same into writing, in clear and "intelligible language." And it is plain that the charge was read out to the Defendant, that he pleaded thereto, and that the boy John William was thereupon examined on oath in support of the information. The evidence of a number of other witnesses was also taken, and the Defendant was represented by Counsel, who exercised the right of cross-examination. Under these circum-

stances, the defendant cannot be allowed now to come up and say, that the Complainant never exhibited any information; and whether he signed it, or not, is wholly immaterial.

The next two objections are as follows—"2ndly. That the infor- "mation does not charge the Defendant with any offence."—"3rdly. "That the information is bad, for uncertainty as to time, place and "offence." Considering that the 7th Section of Ordinance No. 19 of 1856, enacts that, "no objection shall be taken, or allowed to "any information, complaint or summons required by this Ordi- "nance for any alleged defect therein, in substance, or in form." It is clear that no mere technicality can prevail as a ground of objection to any information for an offence punishable summarily; all that is needed is, that the act charged as an offence should be set forth in such a manner as to enable a person of ordinary understanding to know what is intended, and to enable the Magistrate to adjudicate thereon, according to the rights and merits of the case; and I am of opinion that the information here, amply fulfils these requisites.

The fourth objection is, "That evidence was admitted which "was inadmissible;" and it was explained at the hearing, that this referred to the examination of William Greek, who, it was urged, had been allowed to give hear-say testimony. The Defendant was represented by Counsel at that examination, and no objection to the admissibility of evidence appears to have been taken at the time; but whether that be so, or not, I am of opinion that there is nothing in the minutes of evidence to lead me to reverse the Magistrate's decision upon this ground.

The fifth objection is, "that the conviction is bad for uncertainty "as to time, place, and offence, for not showing jurisdiction, and for "being ambiguous and inconsistent."

The conviction is in respect of an offence committed contrary to Ordinance No. 20 of 1862, which by the 72nd. Section, enacts that, "no Summary Conviction under this Ordinance shall be quashed "for want of form." But the question involved in the present objection is of much wider application, and indeed concerns the administration of Justice by the Stipendiary Bench throughout the Colony. I therefore think it desirable that the views which I entertained on this most important subject, should be distinctly expressed, and in doing so, I desire to guard myself against pronouncing an opinion upon the question, whether according to the true construction of Ordinance No. 19 of 1856, a proceeding by way of Review, is the proper course for endeavouring to have a conviction quashed upon technical grounds. If it were necessary to decide that question, I should wish to have it argued before the full Court; looking to the practice which, I believe, has prevailed, but from my point of view, this becomes quite unnecessary.

The conviction is drawn up in one of the forms (I 2) given in the Schedule to Ordinance No. 19 of 1856, which by the 23rd Section enacts that "in all cases of conviction, where no particular "form of such conviction is, or shall be given by the Ordinance "creating the offence, or regulating the prosecution for the same, "and in all cases of conviction upon Ordinances hitherto passed, "whether any particular form of conviction have been, or may be "therein given or not, it shall be lawful for the Stipendiary, or "Special Justice of the Peace, who shall so convict, to draw up his "conviction in such one of the forms of conviction (I 1–3) in the "Schedule to this Ordinance contained, as shall be applicable to "such case, or to the like effect, or as near thereto as may be "material." It is important to bear in mind that the effect to be given to precisely similar words occurring in Jervis's Act, (Stat. 11 and 12 Vict. Cap. 43) has been settled in England.

The point arose in the year 1852, in the case of Reg. *v.* Hyde, (21 Law Journal, new series, M. C., p. 94) and was fully argued before the Court of Queen's Bench.

That was a case of conviction under one of the Game Acts, which provided that one moiety of the penalty should be paid to the Informer, and the other moiety to go to the Overseers of the Poor, and to be paid to one of the Overseers, or to some other Parish Officer, appointed by the Justice. The conviction was simply in the form given in the Schedule to Jervis's Act, and did not apportion the penalty, or specify to whom it was to be paid. It was objected that the conviction was bad; but said Lord Campbell, "this conviction follows the form given in 11 and 12 Vict. C. 43. "If that is not sufficient, such a form becomes a mere snare."

And Mr. Justice Coleridge laid down the law on the subject, in the following terms, which apply exactly to the effect which (as it seems to me) should be given to our Local Ordinance.—"The 17th "Section of that Act (Stat. 11 and 12 Vict., Cap. 43) was intended "to embrace all cases, both of conviction and orders under a "three-fold division. First, where the punishment under the con- "viction was to be by distress, and in default imprisonment; "secondly, where a penalty was imposed, and in default of payment "imprisonment; thirdly, where the punishment was by imprison- "ment only. And in the case of orders, just the same division is "followed. That being the classification, the language of the "Section is, that in all cases of convictions (no exception whatever "being made) it shall be lawful for the Justices to draw up their "convictions in such one of the forms (I 1–3) in the Schedule, as "shall be applicable to the case, or to the like effect. That is to "say, the Justices are to turn to the three froms given, and to "select the one applicable to the particular case. It may turn out "that something may not have been exactly provided for in the

" form, but the Legislature has thought it better to prescribe a " form that may, in all cases, be used, than to leave the conviction " open to every attack which might be pointed out by ingenuity, " knowing well, as we do, in this case, that no substantial hardship " would follow to the party convicted; it being remembered also, " that we are dealing with a conviction which may not be drawn up " at all, unless required for the purpose of an appeal. I think, " therefore, that as the conviction follows the form given by the " Statute, it is perfectly valid." In 1854, the same question was again argued before the Court of Exchequer, *ex parte allison*, (24 Law Journal, new series, M. C., p. 72) which is not dissimilar in some of its circumstances to the present, inasmuch as there the prisoner had been convicted of ill-treating his child, a boy of seven years of age, and sentenced to six calendar months' imprisonment with hard labour. The warrant of commitment was filled up according to the form given in the Act, and it was objected that it was bad, as not shewing jurisdiction, in support of which Paley on Convictions, and various authorities were cited. But, said Pollock, C. B.; " no doubt that in point of fact the conviction was " made by Magistrates having jurisdiction, and sitting at the right " place; and it would be very unsatisfactory if we were compelled " to decide that the conviction was bad, on technical grounds. I " do not go into the general law, as it was before the recent Statute, " and indeed, there would be great difficulty in reconciling the " decisions and the dicta of the text-writers, are not borne out by " the authorities. The decisions are, however, immaterial by reason " of the Statute. It was passed for the purpose of facilitating the " administration of Justice, and it furnished forms by the adoption " of which Justices might make their proceedings correct and free " from comment." And Mr. Baron Platt remarked that, " all the " old learning on the subject is swept away by the 24th Section."

With these decisions to guide me, I can have no hesitation in coming to a conclusion as to the effect, which should be given to the corresponding provisions in our Ordinance, No. 19 of 1856; and I am, therefore, clearly of opinion that if a conviction follows the form given by the Ordinance, that is quite sufficient.

But some objections were taken to the mode of filling up the conviction, founded apparently upon the fact that the Magistrate had inadvertently failed to run his pen through the whole of the printed matter relating to the payment of costs. Here again, I refer to the Ordinance, which enacts that " no warrant or other " process issued under the authority of this Ordinance, shall be " held void by reason of any defect of form therein, but shall, if " expressed with reasonable accuracy, be supported by all Courts " and Judges, as good and effectual for the purposes for which it " shall have been issued." It is clear that the Magistrate did not

impose costs in addition to the fine, and that the adjudication of imprisonment is in default of payment of the single sum of Ninety-six Dollars, the amount of the fine. The Defendant is not to escape punishment merely because the Magistrate in filling up a formal document, omitted to strike out all the immaterial words which became unnecessary by reason of the non-imposition of costs.

It was also urged, that there was nothing to shew that the boy was under fourteen years of age; but by the terms of the Ordinance that was a matter for the exercise of the Magistrate's own judgment, and not of formal proof. The words are—"When any "person shall be charged before any Stipendiary Justice of the "Peace, with an assault or battery, upon any male child, whose age "shall not, *in the opinion of such Justice,* exceed fourteen years." And Mr. Plummer declares upon the face of the proceedings, that the boy "is evidently under fourteen years of age." That is sufficient to satisfy me as to the opinion of the Magistrate upon which he acted in dealing with the case, under the 44th Section of the Ordinance of 1862.

It was, lastly, objected "that the conviction is against the weight "of the evidence, and contrary to law;" but I think that the conviction is fully sustained by the evidence, and therefore dismiss the Review, with costs.

A. V. COLVIN *v.* JOHN LEACOCK, DISTRICT COMMISSARY.

16th September, 1865.

(Ordinance 30 of 1856.)

Roads—Liability to make them up must be proved.

THIS was an appeal from the decision of Mr. CHARLES COX, S.J.P., who convicted Appellant of neglect to comply with a notice to make up his Road at Plantation *Beau Voisin.*

SMITH, C.J., gave judgment as follows:—

In this case the Applicant for Review, Mr. Colvin, was charged by Mr. Leacock, District Commissary, with neglecting to comply with the requirements of a certain Road Notice, addressed to the owner, or person in charge of Plantation *Beau Voisin,* situate in Canal No. 1, in the Demerary River, and was convicted under the 45th Section of the Road Ordinance.

It was contended in Review, that the conviction was bad on two

grounds; first, because there was nothing to connect Mr. Colvin with the Plantation, or to show that he was the owner or person in charge; and secondly, because the charge was under the 32nd Section, and the conviction under the 45th Section of the Road Ordinance.

With respect to the first objection, it is undoubtedly true, that in order to establish a personal liability to a pecuniary fine against an individual for the non-repair of the Public Road of a Plantation, it must appear in some legal way upon the face of the proceedings, that the party proceeded against is the owner, or person in charge of the Plantation; but in the present case, no such objection is open to Mr. Colvin in Review. The ground of his defence before the Magistrate was that, "when he received the notice the rain was "falling in such a way, that he could not do his Road; that he is "now doing it." Having thus admitted his liability, he cannot now come up and urge a ground of defence wholly inconsistent, with that taken at the hearing.

With respect to the second objection, I do not think that it can be sustained. The Defendant cannot plead ignorance of the charge he was called upon to meet. It was proved that he had been served with notice to repair the Public Road of Plantation *Beau Voisin;* that he neglected to comply with such notice, and that the Road was allowed to remain in a very bad state; so much so, that it became dangerous to drive a carriage over it. The Defendant did not deny the facts, but asserted that he was prevented by the rain from doing the necessary work. No proof, however, was offered in support of his defence, and under the circumstances, I think that it was quite competent to the Magistrate to convict him under the 45th Section, which imposes a fine on any person "neglecting to "keep the allotment of Road, and the Bridges on the part of a "Canal for which the Estate he owns or represents, in good order "and repair."

For these reasons, the application for Review must be dismissed with costs.

A. V. COLVIN *v.* JOHN LEACOCK, DISTRICT COMMISSARY.

16th September, 1865.

(Ordinance 30 of 1856.)

Roads—Liability to make them up must be proved.

THIS was an appeal from the decision of Mr. CHARLES COX, S.J.P. The Road Ordinance has been somewhat modified by the provisions of Ordinance 12 of 1866.

SMITH, C.J., gave judgment as follows :—

In this case the Applicant for Review, Mr. Colvin, was charged by Mr. Leacock, the District Commissary, with neglecting to comply with the requirements of a certain Road Notice, addressed to the owner, or person in charge of Plantation *Uitkomst*, situate in Canal No. 1, in the Demerary River, and having been convicted, a Review of the proceedings was sought on the same grounds as were urged by his Counsel in the *Beau Voisin* case.

I have carefully read through the papers, and find that there is nothing whatever upon the face of the proceedings, from which it can be taken as either legally proved, or admitted that Mr. Colvin was the owner, or person in charge of Plantation *Uitkomst*. The case therefore fails on an essential point, and I feel bound to reverse the Magistrate's decision, and to quash the conviction with costs.

TIMOTHY ADAMS AND JOSEPH FINGALL

Versus

THOMAS MAYERS.

7th October, 1856.

(Ordinance 20 of 1865.)

Fraudulent Possession—Measure of punishment—Contradictory evidence—Reasonable suspicion.

THIS was an appeal from the decision of Mr. J. D. FRASER, S.J.P. The facts as deposed are, that the Appellants were found on the night of the 11th April, carrying a bag, in which was found a tin vessel containing rum. There were other suspicious circumstances connected with their possession of this rum.

SMITH, C.J., gave judgment as follows :—

In this case the Applicants for Review, together with four others were charged by Sergeant Mayers, of the Police Force, " with having

" on the night of the 10th April, 1865, at Buxton Village, in the " Parish of St. Paul, and County of Demerary, in their possession, " a tin case containing rum, the same suspected of being stolen, " contrary to Ordinance No. 20 of 1856." And at the hearing the charge was dismissed against all the Defendants, except the two now before the Court, who were convicted and sentenced to fine and imprisonment.

From this decision they have petitioned in Review, upon a variety of grounds, which may be arranged under the three following heads :—

First—That the evidence was not sufficient to support the conviction.

Second—That the charge and conviction disclosed no legal offence.

Third—That the amount of punishment awarded was in excess of the Magistrate's jurisdiction.

With respect to this last objection, there is a decision of His Honor, Mr. Justice Beete, in the case of Simon King *v.* M. Baptist, pronounced in May of this year, which is in the Applicant's favor upon the question of excess of jurisdiction; but having conferred with His Honor respecting that decision, he agrees with me in desiring that the point should be re-considered whenever the necessity arises. It is not upon this ground, therefore, that my judgment rests; but it proceeds upon the opinion, formed after carefully weighing the evidence, that it fails to sustain the conviction.

In announcing this result, I desire to guard myself against being supposed to accede to the argument which was addressed to me at the hearing, that the case failed because there was no proof that any person had lost rum, or as to how it had been obtained. In my opinion, all that is necessary to insure a conviction under Ordinance No. 20 of 1856, Section 2, para. 6, is, a reasonable suspicion that the thing found in the possession of the party accused, has been stolen, or unlawfully obtained, coupled with a failure to account for the same to the satisfaction of the Magistrate. The principle is the same as that which governed the ruling of the Court of Exchequer, in re. Boothroyd, (15 Meeson and Welshby 1) with respect to the construction to be placed upon the Stat. 17 Geo. 3, Cap. 56, Sect. 10, which made it a misdemeanour to be in possession of materials used in Woolen Manufacture, suspected to be purloined or embezzled. There it was held that the conviction need not state the ownership or value of the materials, nor the Defendant's knowledge of their having been purloined or embezzled, and Mr. Baron Parke (now Lord Wenslegdale) pointed out, that " it matters not to whom the goods belong, because the offence " consists in the suspected party failing to give the Justices a " satisfactory account of how he became possessed of them.

In this case, there is to my mind, no sufficient proof to connect Fingall and Adams with the rum seized, under such circumstances as to raise the "reasonable suspicion," contemplated by the Ordinance.

The charge was brought upon information, and depends upon the testimony of Jeremiah Will and Charlotte Quammy, the two principal witnesses for the prosecution; but their account of the same transaction is so essentially different, and their statements are so repugnant and inconsistent with each other, that it is impossible to reconcile them. I think, that a jury would not have been warranted in convicting upon such evidence; and if it would not suffice to sustain a verdict, it follows that it cannot uphold a conviction for the Magistrate in this respect, exercises the function of a jury.

I, therefore, feel bound to reverse the decision, and to quash the conviction.

D. C. CAMERON *v.* CHANG-AH-POO.

7th October, 1865.

(Ordinances 19 of 1856, and 4 of 1864.)

Immigration—Deserters—Limit of time for making charge—Warrants of apprehension.

THIS was an appeal from the decision of Mr. H. P. PLUMMER, S.J.P. The facts are sufficiently indicated in the judgment. The limit of time in which to file charges against Indentured Immigrants who have deserted, has been removed by Ordinance 13 of 1866.

SMITH, C. J., gave judgment as follows:—

In this case, the Defendant was charged by Mr. D. C. Cameron, the Manager of Plantation *La Jalousie*, "for that, he the said "Chang-ah-Poo, did desert from Plantation *La Jalousie*, from the "18th March, 1864, to the 25th July, 1865, he being an Indentured "Immigrant on that Estate." And the complaint was dismissed by the Magistrate after hearing evidence, upon the following grounds as stated by him—"It appears that Chang-ah-Poo's indenture "expired in March last, I therefore am of opinion, that as he no "longer belongs to *La Jalousie*, I have no power to inflict a "punishment on the charge as laid."

Before proceeding to enquire whether the Magistrate was right in dismissing the complaint upon the grounds assigned, I cannot pass over without notice, a memorandum, which he has appended

to the proceedings, in these words—"On the 13th March, 1865, a "similar charge was brought against accused by Mr. Cameron, "before Mr. Jeffrey, and was dismissed, owing to the complaint not "having been brought within one month from the date of the "desertion." The Applicant for Review certainly disputed at the hearing through his Counsel, the accuracy of this statement, averring that the complaint alluded to as having been dismissed by Mr. Jeffrey, was not against Chang-ah-Poo, but against some other Chinese labourer. But it is clear, that this is a matter of fact which would have to be cleared up before the case could be properly disposed of in any way adversely to Chang-ah-Poo, for it is contrary to the policy of the law, that a Defendant should be put in peril a second time for the same cause. The 20th Section of Ordinance No. 19 of 1856, expressly enacts that, where a Magistrate dismisses an information or complaint, "he shall make an order of dismissal "of the same, and shall give the Defendant in that behalf, a "certificate thereof, which said certificate, afterwards, upon being "produced, without further proof shall be a bar to any subsequent "information or complaint for the same matters respectively, against "the same party." And the cases of Hancock *v.* Somes, and Costur *v.* Hetherington, reported in the 1st. Volume of Ellis and Ellis, have established that the certificate is merely a record of that which has been already adjudicated, namely, the dismissal of the complaint; and that the act of the Magistrate in granting it is not judicial or discretionary, but Ministerial only. Having dismissed the complaint, he is bound to grant a certificate thereof, whenever applied to by the party entitled, and the application may be made at any time.

Leaving this point with the foregoing prefatory remarks, I come to the evidence, which is to the following effect—That the Defendant was indentured to Plantation *La Jalousie* on the 13th March, 1860, for a term of three years; that not having been transferred to any other Plantation, he was considered to have been bound to serve on *La Jalousie* for the two following years; that he left the Estate on the 18th March, 1864; that he voluntarily returned on the 25th July, 1865, in order to pay back the amount of his advances in China; that the money was received from him, and that he was then immediately arrested and sent to the Station, upon the charge of being a deserter since the 18th of March, 1864.

For the purposes of this Review, I am willing to assume that the indenture was renewed for two years, as seems to have been taken for granted at the hearing, although, it is worthy of note, that the indenture list which was put in evidence, while containing an entry by the Sub-Immigration Agent of such renewal with respect to a number of other Chinese therein mentioned, is wholly silent as regards Chang-ah-Poo. But even upon the assumption of renewal, it is plain that the indenture expired on the 13th of

March last, and it was never renewed previous to its termination, on account of desertion under the provisions of any of the Immigration Ordinances. The Magistrate was therefore, quite right in holding that the Defendant could not be treated as a deserter during any period subsequent to the expiration of his indenture.

But the essential point on which the case fails is this—The complaint is made in respect of an offence punishable on Summary Conviction, under the Consolidated Immigration Ordinance; and the 163rd. Section is in these words—"Any information laid, or "complaint, or charge made in respect of any offence punishable "on Summary Conviction under the provisions of this Ordinance, "shall be so laid, or made within one month from the day on "which the offence may be alleged to have been committed, or "in which the cause of complaint, or charge may be alleged to "have arisen. And if it shall appear on the hearing of any such "information, complaint, or charge, that any such offence was "committed, or that the cause of the complaint, or charge arose at "any time beyond the period of one month from the day on which "such information was laid, or complaint or charge made, any such "information or complaint, or charge shall be at once dismissed "with costs." In the face of this Section, it was impossible for the Magistrate to have done otherwise than dismiss the complaint. The desertion is charged to have commenced on the 18th March, 1864; the indenture expired on the 13th March, 1865, and the complaint, instead of being made at furthest, within one month of this latter date, was not brought until the 27th of July following, a period exceeding four months from the time when the Defendant ceased, under any circumstances, to be a deserter from Plantation *La Jalousie.*

The case has been argued as if it was one of extreme hardship and inconvenience, and it was urged that the complaint could not have been brought before owing to the act of the Defendant himself, and that he could not take advantage of his own wrong. The answer to this argument is, that it was perfectly competent to the employer to have made his complaint at the time the desertion took place, and that under Ordinance No. 19 of 1856, a warrant of apprehension could, without the least difficulty, have been obtained upon the matter of the complaint being substantiated on oath. It may be that, frequently a deserter cannot be found until some time after the issue of the warrant, but the law provides for this and enacts (Section 10) that "it shall not be necessary to make "the warrant returnable at any particular time, but the same may "remain in full force until it shall be executed; and such warrant "may be executed by apprehending the Defendant at any place "within the Colony." The Ordinance does not say that the case must be heard and determined within one month from the commission of the offence, but only that the charge must be made

within that time, and if this is done, the Statutory limitation is complied with.

The fact, that a Defendant absconds, is no reason for not putting the law in motion against him, and obtaining processs to enforce his attendance to answer the charge, but rather the reverse, and, therefore, the argument, *ab-inconveniento,* does not apply.

It only remains for me to state that, this application must be dismissed with costs.

ANTONIO DE GAR OTHERWISE CALLED ANTONIO RODRIGUES DE GAR *v.* LOUIS CORIA.

20th November, 1865.

(Proclamation of 1796.—Ordinances 20 of 1856, and 21 of 1862.)

Killing Pigs trespassing—Procedure—Practice.

THIS was an appeal from the decision of Mr. H. P. PLUMMER, S.J.P. The facts appear sufficiently in the judgment. Section 49, of Ordinance 21 of 1862 gives the Stipendiary Justices jurisdiction in cases where any one "shall wilfully or maliciously commit any "damage, injury, or spoil, to, or upon any moveable or immoveable "property whatsoever, either of a public or a private nature, for "which no punishment is hereinbefore provided." By Section 37 of the same Ordinance, a punishment is provided for the offence of killing cattle.

SMITH, C.J., gave judgment as follows:—

In this case, the Applicant for Review, Antonio de Gar, was charged by Louis Coria, with unlawfully killing his Pig, of the value of Four Dollars, and was sentenced by the Magistrate to pay forthwith, the sum of Four Dollars in satisfaction to the Complainant, to be levied by distress, and in default of sufficient distress, the said Antonio de Gar, was condemned to be imprisoned for twenty days with hard labour, and was also ordered to pay the Complainant's costs amounting to 88 cts.

A Review of this decision was sought on the three following grounds:—

1st.—That the Defendant was justified in killing the Pig, under the provisions of the Ordinance of 1796.

2nd.—That the Magistrate improperly sought, and received evidence to contradict the Defendant's witnesses, after the Complainant's case was closed.

3rd.—That the penalty awarded was contrary to law.

With respect to the objection taken to the course pursued by the Magistrate at the hearing of the complaint, it appears that the Defendant admitted the shooting of the Pig, but justified it under the Ordinance of 1796, on the ground that he had given to the Complainant two previous notices, as thereby required. In support of this defence, he called a witness, Samuel Welch, who swore to one notice having been given in his hearing by the Defendant, and in answer to the Magistrate, he stated that a man named Campion was present at the time, and heard what was said. Thereupon, the Magistrate immediately proceeded to examine Campion, who happened to be in Court, over-ruling an objection taken to this by the Defendant's Counsel, and Campion gave a direct denial to the statement of the witness, Welch. The Defendant then called a second witness to prove another notice given to the Complainant's wife, and the Magistrate re-called Campion, and received further evidence from him. There can be no doubt that this mode of procedure was irregular. The Magistrate should not have interrupted the evidence for the defence, but should have heard it to the end, and then at its close, he might, if the Complainant wished, have examined Campion in reply. But I should be sorry to dispose of this case on the ground of an irregularity in the conduct of the cause, which does not appear to have worked any real injustice, and to have proceeded from a desire on the Magistrate's part to ascertain the truth between the parties, although in his manner of endeavouring to arrive at it, he fell into a mistake.

I prefer to deal with it upon a broader ground, and while fully conceding that in a conflict of testimony, the Magistrate is the proper judge of the credibility of the respective witnesses, I am yet of opinion that the conviction is wrong. This is not a civil suit for damages; it is clear from the Complainant's own evidence that the Pig was shot while trespassing in the Defendant's premises. There was no attempt to convert the carcase, and the Defendant appears to have acted under the *bonâ fide* supposition, that he was justified in destroying the animal, *damage feasant*, on his own property. It is not averred in the charge that the act was done maliciously; and indeed, if the Defendant had killed the Pig unlawfully and maliciously, the offence would have amounted to felony, (Ordinance No. 21 of 1862, Section 37) whether in that case the Magistrate might in the exercise of his discretion, have dealt with the matter summarily under the Petty Offences Ordinance, as a malicious injury to property, not exceeding in value Ten Dollars. (Ordinance No. 20 of 1865, Section 2, para. 6). It is not

necessary for me to decide, inasmuch as under that Ordinance the Magistrate had no power to award the penalty to be paid to the Complainant; and I am of opinion that the 49th Section of Ordinance No. 22 of 1862, does not apply.

For the foregoing reasons, I feel bound to reverse the decision of the Magistrate, and to quash the conviction with costs.

JOHN VIERA *v.* J. T. GREENSLADE, DISTRICT COMMISSARY OF TAXATION.

6th January, 1866.

(Ordinance 8 of 1858.)

Precision of Charge—Construction of Statutes.

THIS was an appeal from the decision of Mr. LANDRY, Acting S.J.P. The 10th Section of Ordinance 8 of 1858, (repealed by Ordinance 25 of 1868) provided that it should not be "lawful for any Licenced "Retail Spirit Dealer to sell by retail, or other spirituous liquor "from a cask or other package, holding less than twenty gallons." The construction of that Section is the principal point of interest in this case.

BEAUMONT, C. J., gave judgment as follows:—

This appears an anomalous case throughout. It has been treated as a penal information, under Ordinance 8 of 1858, and the conviction is thereupon; but it really stands in the record as a mere condemnation of a cask and ten gallons of Rum; and various difficulties and inconsistencies have arisen in the proceedings from this laxity and confusion.

Again, this proceeding was commenced on the very day of seizure, and proceeded on by the Magistrate five days afterwards. But, (assuming the proceedings regular on the face of them) whether it is competent to the Commissary of Taxation to commence any such proceeding, to anticipate the condemnation which might otherwise follow at the expiration of the 14 days, allowed by Section 4 for claims to be made, is, at all events, very doubtful.

I say no more on these points, because the questions were not argued before me, and there are quite sufficient difficulties about the Ordinance to make it undesirable to enter on any unnecessary discussion of its provisions. It may be, that Mr. Viera might have treated this proceeding of condemnation as null and *coram non*

judice; but Mr. Greenslade having adopted it, and Mr. Viera's having so far recognised it as to seek a Review, I take the proceedings and the Magistrate's decision, or act of condemnation, as I find them on the record, and shall deal with them as far as possible on the grounds which were relied on in argument before me.

Those arguments were two, and the first of them was, that there is no evidence of the sale alleged. There is, however, quite sufficient evidence of a sale or sales from the cask in question, to prevent me from interfering with the Magistrate's judgment on the matter of fact, though it is true that there is no evidence of an actual sale on the 7th of September. But amongst the irregularities of the proceedings is this—That the "charge," so to call it, is stated in two different ways. The charge under Mr. Greenslade's hand, expressly alleging a sale on the 7th September; the charge entered in the record, only specifying that day as the day of finding on Viera's counter, "from which Rum was sold by retail;" but not specifying any day on which such Rum was sold. Whether or not, such a charge is sufficiently precise to sustain a condemnation, however, for such a purpose alone, and taking into account the special provisions of the Ordinance on the subject, a proceeding of this nature (if allowable at all) ought to be tested by the same rules that are applicable to proceedings for convictions and penalties proper—to these are questions which may be of more or less doubt, but which were not urged before me, and which I desire to avoid deciding. But taking the record of the proceedings before the Magistrate, as I find it, I cannot say there is no evidence to sustain the sale as alleged in that record.

The second argument before me was, that the sale was not illegal, thus raising a question on the construction of the Ordinance, viz., whether or not, every cask used by a Retail Spirit Dealer must at all times, *actually contain* twenty gallons, or whether it is not enough that it be *of that capacity.* Now, on this question of construction, I adopt the Appellant's argument.

I do not find it indeed to be the fact, as I understood from his Counsel it was, that there is any evidence that the cask in question is of the capacity of twenty gallons; but the argument is still, as I think, applicable to the case. For although in disposing of a claim made under the Ordinance, and possibly in any case of dispute, except such a proceeding as this, the provisions of Section 6 would throw the onus of proving the illegality of the seizure on the Claimant, yet, I apprehend that in this proceeding, which is one instituted (whether rightly or not, I do not say) by the Revenue Officer to anticipate the condemnation in the prescribed course of law, and in which he comes forward to make out his own case; he must be required to sustain that case; and if he wants to rest his case on his statutable privileges, he must let it rest on the statutable

rules, and leave it to await the issue of a claim under Section 4, on a condemnation at the expiration of 14 days in default of such a claim. This, he has not been content to do; yet he has given no proof that the cask was of a capacity less than twenty gallons; for in his evidence, when speaking of its contents, it is clear that he speaks of the quantity of Rum actually found in it, and not of its capacity.

But this is not sufficient in my opinion. It is unfortunate certainly, that the Ordinance is framed in ambiguous language; but I think that enough is found to lead to the conclusion that the words in para. 10, "holding less than twenty gallons," are there used idiomatically to mean "of the capacity to hold twenty gallons."

In ordinary parlance, either use of the verb "hold," is familiar enough. We should, any of us, say that our shelves, or our vats hold so many books, or so many hundred gallons; in either sense, leaving the precise sense to be determined by the context or circumstances; and perhaps the word is even more susceptible of this flexible, or doubtful meaning in the participle, than in other modes of speech.

This being so, I turn to the Ordinance to try and ascertain from its subject and the context, in which sense it is used, and I conclude that it is used in the sense of dimension or capacity, from two considerations—First, the inconvenience and apparent unreasonableness of supposing otherwise. For then, not only must every Retail Spirit Dealer use casks larger than twenty gallons, for each gill sold would otherwise be an offence; but in those larger casks he must actually leave from year's end to year's end, twenty gallons of spirits undrawn, and this for no object that suggests itself. We can see a motive for requiring Retail Dealers to sell from casks of certain demensions; but surely none for requiring them to keep twenty gallons undrawn for-ever in each vessel used.

But again, the schedule contains a form of condemnation adapted to this Section—a form which may, for some purposes, (and I think for this purpose) be read in connection with the Section itself, and from that form it is clear that the ground of condemnation which the Legislature had in view is, the vessel being "under the "prescribed size" of twenty gallons.

On these grounds then, I conclude (taking the proceedings before me as regular otherwise, and as the proper subject for Review by this Court) that the Complainant was bound to shew a sale from a vessel, "under the prescribed size," that he has not shewn it, and that therefore the condemnation cannot be sustained; but must be reversed, with costs, and the Rum and casks must be re-delivered to the Appellant.

JOB VAN BATTENBURG *v.* JOSEPH BURNHAM.

19th May, 1866.

(Ordinance 28 of 1847.)

Fraudulent Impounding—Bonâ fide Claims to Land.

THIS was an appeal from the decision of Mr. H. P. PLUMMER, S.J.P. Ordinance 28 of 1847 has been repealed by Ordinance 7 of 1866, but Section 9 of the latter contains much the same provisions as Section 4 of the former.

BEAUMONT, C. J., gave judgment as follows:—

In this case, numerous objections have been alleged against the proceedings below.

Passing by matters merely formal, it was objected that they must be quashed, because the Magistrate had formerly heard and dismissed the same charge.

The Appellant sought to make this out upon affidavit.

Now, on the one hand, I must say that if such had been a regular course, this affidavit would have required an answer which for anything I can tell, might have been conclusively made, and on the other hand, I do not mean to deny that cases may occur in which affidavits upon such a matter may be read. But undoubtedly the regular, and as undoubtedly the only convenient practice in such cases is to have the former proceedings themselves brought before the Court. It is true, that to do so, requires some pains and some experience; but while this is easily exaggerated, it is also true that rules of such manifest importance, cannot be disregarded or lightly dispensed with. In this case, I feel that I must decline to try upon the affidavit before me, the question, whether the charge now before the Court was, or was not previous to these proceedings really heard and dismissed.

Coming then to the merits of the charge, it is found to be framed (though, as will be seen ultimately, erroniously framed) under Section 4 of Ordinance 28 of 1847, which makes penal a very intelligible offence of a character entirely special. Not any illegal impounding, or any trespass done in the course of impounding, but a certain fraudulent act for the purpose of effecting a legal impounding. That act is the driving off any stock from the Estate or property of the Owner with the view of making them strays.

Now, it is clear on the evidence that the offence so constituted is not brought home to the Defendant. Taking merely the act

alleged against him, it is clear that it was not a driving of the Complainant's sheep off his land with the intent so to make them strays, but it was the wholly different act of dealing with them as *actually strays* on the middle-walk of an Estate, where they were actually feeding, and as to the right of property in which there is some dispute between the Complainant and Defendant. They were driven off from that Middle-walk to the pound, and were impounded by the Complainant. That may, or may not have been illegal; an illegal impounding or a trespass of some more general character; but that is a matter of complaint wholly distinct, and widely different from the offence under the Section in question; moreover it is one which clearly could not have been tried by the Magistrate in such a case as this, inasmuch as it manifestly involves conflicting claims to the land in question; claims which would oust his jurisdiction altogether. Of the nature of these claims, I know nothing, and indeed I could know nothing of them sitting in this jurisdiction, except that they are maintained. That is the only point to which I can here look. Is there a *bonâ fide* dispute, or is it merely a pretence and a trick set up to elude the jurisdiction? Here the whole evidence shows that the dispute as to the Complainant's right to the Middle-walk is a *bonâ fide* dispute.

This consideration indeed only occurs indirectly in the light in which I have so far noticed it; but it recurs directly with reference to the charge as it stands, or as it is assumed to stand, viz., as a charge founded on Section 4 of the Pound Ordinance. For to the offence there created, it is essential that the sheep should have been *driven off the Owner's land* with intent to make them strays. This provision no doubt requires that the ownership of the land should be shewn, a requirement which is easily satisfied by *primâ facie* evidence where there is undisputed possession, but at the same time, it by no means qualifies the rule by which, if the ownership of the land *appears* to be in dispute between the parties, the Magistrate's jurisdiction to entertain a criminal charge is ousted.

It is, however, urged for the Respondent, that the Appellant's reasons of Review do not open these objections to him; and I must say, that it is difficult in this case, as it often is in such cases, to do substantial justice on the merits, with a due regard to the legitimate formal requirements of the law. Beyond question in cases of this nature, the reasons alleged should be fairly and liberally expounded, so as to do justice, beyond question; also there may be apparent defects in proceedings brought under Review, which the Court is bound to notice, and act on even when not specified by the Appellant's reasons. Still I should feel considerable hesitation in allowing to the Appellant, the benefit of these objections, upon this Review; but for one consideration, which (as I pointed out upon the argument) appears to me decisive in his favor, viz., that

the fourth reason, even if too confined to admit the objections in the sense in which they have thus far been noticed, is still sufficient to require me to quash the conviction.

ANTONIO DE RUCHE *v.* E. H. WATSON, DISTRICT COMMISSARY OF TAXATION.

26th May, 1866.

(Ordinance 8 of 1858.)

Conflicting evidence insufficient to support conviction.

THIS was an appeal from the decision of Mr. J. D. FRASER, S. J.P. The Appellant was charged with having sold Gin, without having a licence so to do.

BEAUMONT, C.J., gave judgment as follows :—

In this case, the point for my consideration is, whether there is any evidence to support the Magistrate's conviction. That is an unsatisfactory enquiry; as it is a matter of no small importance, and a rule which all superior and appellate Courts desire to carry as far as possible, not to Review the exercise of the Judicial discretion of inferior Tribunals, and in particular not to reverse, or even re-consider the conclusions drawn by them from evidence on which they have acted.

Still, that wholesome rule has to be applied within limitations which this case, I think, transgresses. On hearing it, I felt myself indeed embarrassed, because, though the evidence would not have sufficed, in my judgment to sustain the conviction, there did appear to be evidence on which the Magistrate, in the exercise of his judgment, might have acted. It is true, that the evidence of the witness Watson, was inadmissable, as being merely hearsay; but the force of this objection was materially lightened, inasmuch as McLean, from whom Watson's information was derived, was himself called.

His evidence, however, must be deemed of very doubtful credit. A person who, having no concern in the subject matter of complaint, and no official duty or responsibility in respect thereof, acts as Complainant or Informer in a penal information, to result in a fine, of which a portion would, or might go to him, is one whose evidence is always looked upon with suspicion. To prompt, or induce another to commit a penal offence, is an act of at least a

very doubtful character; one which *primâ facie*, at all events, is itself a serious offence, and which even when entered on by Peace Officers, or others having a duty to discharge in the interest of Justice, is a matter of delicacy and responsibility. But when such an act is undertaken by a mere volunteer, he must be deemed an accomplice, if not a conspirator. Such is the character filled by McLean. He calls himself a spy, but he is really an accomplice, and the evidence of such a witness, even when admissable at all without corroboration, is of the slenderest weight, and such that, if contradicted, defective, or inconsistent, it must be entirely discarded. Yet, as I could not say that McLean's evidence was in point of law inadmissable, I was at first much disposed to consider its weight, in connection with that of Dunbar, a matter proper to be left to the judgment of the Magistrate.

That, however, was under the mis-apprehension, that the contradictory evidence of Dunbar was referred to by Mr. Lynch as evidence for the *defence*, but on going over the proceedings, I find that he was really called for the Complainant. Now, it is a manifest rule of Justice, that when an accusation is supported by several witnesses, who differ as to its substantial features, unless such differences can be reconciled, or except in cases of palpable mistake, or of apparent collusion or *mala fides*, the Prosecutor cannot put his case higher than his least favourable witness. But here Dunbar directly contradicts McLean in the most material circumstances. That he is himself a witness of no very estimable credit, may be possible. Indeed, his evidence appears so far singular and suspicious that, had he been a witness for the defence, I should assuredly not have interfered with the Magistrate's conclusion. But on considering the case as it stands, I am bound to say that the conviction cannot be sustained. If the Magistrate discredited Dunbar, there may have been ample room for proceeding against him for perjury, inasmuch as he must have wilfully forsworn himself on points material to the Complainant, against de Ruche. But, whether desirable or not to take such proceedings, his statements cannot be discarded in this case. Here, it is clear, that with one untrustworthy witness swearing against the accused, and another called by the Complainant, who directly exonerates the accused and contradicts McLean, I am bound to say that there is no evidence on which the Appellant can be convicted. I therefore must set aside the conviction, with costs.

JOHN NAGHTEN *v.* JOHN CHARLES LLOYD.

16th June, 1866.

Ordinance 30 of 1856.

Using Cart without having name on it—Procedure—Servant not liable for Master's default—Vagueness of Charge.

THIS was an appeal from a decision of Mr. HUMPHREYS, S.J.P.

BEETE, J., gave judgment as follows:—

In this case, the Plaintiff in Review was charged with "using a "Mule and Cart on the Public Road, without having the name and "numbers thereon, in plain legible letters and figures."

To answer this very vague, and I may say, incomprehensible charge, he was summoned to appear at Suddie Court, in the County of Essequebo, on Friday, the 9th of March, last.

By some uncontrolable mistake, on the 8th of March a warrant was issued for his apprehension, and he was taken into custody and locked up; bail for his appearance being refused.

This alone, would be sufficient to vitiate the proceedings; but apart from this, there is no offence set out in the summons, or in the warrant, although in the conviction, it is attempted to remedy those defects.

It is uncertain whether the "name and numbers" mentioned in the summons and the warrant are those of the mule, the cart, the owner, or the driver.

On the merits, independently of all technical objections, the conviction must be set aside. The Plaintiff in Review, did not use the cart, he was merely the servant of the Estate to which the cart belonged, and therefore not liable for any defaults on the part of his employer.

The proceedings are, altogether, both in form and substance, so utterly bad, that the conviction must be quashed, with costs.

RICHARD DAVID *v.* MARTHA HOSANNAH.

23rd June, 1866.

(Ordinances 19 and 20 of 1856.)

Conviction—Terms of imprisonment—Evidence.

THE facts are fully indicated in the decision.

BEETE, J., gave judgment as follows :—

This is an appeal from a decision of Mr. Stipendiary Magistrate FRASER, on a charge of theft of a pair of Scissors, made by the Respondent against the Plaintiff in Review.

With regard to the merits of the case, I say nothing; but the conviction is clearly bad, and that for several reasons. The Magistrate has sentenced the Plaintiff in Review, to be imprisoned for one calendar month; whereas, by Ordinance 19 of 1856, he was only authorised to award imprisonment for thirty days.

He further adjudges the Plaintiff in Review, "to pay the sum of Twenty Dollars; (He does not say as a penalty, or to whom it is to be paid) "and if the said sum be not paid when due;" (what does that mean ?) "or if there are not sufficient goods and chattels "belonging to him to levy on, he adjudges the Plaintiff to be "imprisoned for a further period of two calendar months."

Now, nothing can be more clear than that the law is to be taken from the Ordinance itself, and not from the forms in the Schedule, Section 36, of Ordinance 19 of 1856, clearly states that it is *upon a return being made* that no sufficient goods of the party against whom a warrant of distress shall have been issued, can be found that the Magistrate may commit the Defendant for any term not exceeding two calendar months.

In this case there is no warrant of distress, and there could be no return and consequently there can be no legal commitment.

But independently of these objections to the proceedings in this case, there is one apparent on their face of so grave a character as would alone be sufficient to vitiate them.

On the Twenty-eighth of May, the day the case was first heard, at the close of the case for the prosecution, appears a statement of the Defendant to the following effect; "I bought that pair of "Scissors at Messrs. Pinto Brothers for 32 cents, on Tuesday, 8th "May, no one was with me, I bought that Razor at same time and "place for 88 cents, I shewed both to my keeper, Jane Wheeler."

Afterwards there is a memorandum of remand to the 4th of June for further enquiries as to the Scissors. On the 4th of June there is this further memorandum "Vigilance Court, June 4th "1866. The case called on 23rd and 28th May, and postponed to "date, to endeavour to test the truth of Defendant's statement "where he bought the Scissors, and was resumed June 4th 1866," and then Sergeant Phillips is examined and states that "according "to instructions I went to Georgetown on Friday 1st June, and "I took with me that pair of Scissors, the Scissors in this case, "the Razor and Strop to the store of Pinto Brothers; I shewed "the Scissors, Razor and Strop to one of the clerks, and I was told "that those Scissors were not bought at that store. I got this "certificate to the effect, that the Scissors were never bought in "the store of Pinto Brothers, they said they had similar Razors "and strops which they sell for 24 cents each."

Now, it must have been for the purpose of settling some doubt which the Magistrate entertained, that this highly irregular and in fact illegal course was adopted, surely it cannot be pretended that what Sergeant Philips stated to have been told by a clerk of Messrs. Pinto Brothers was any evidence at all, and yet I cannot come to any other conclusion than that the decision come to by the Magistrate was influenced by this evidence, if it can be so called, so improperly obtained and still more improperly admitted.

The admission of such utterly worthless testimony would have been quite sufficient, had the proceedings been otherwise unimpeachable to have warranted a reversal of the Magistrate's decision which is accordingly reversed with costs.

CHEESEWRIGHT JOSIAH *v.* PRINCE WILLIAM GAY.

23rd June, 1866.

(Ordinance 10 of 1851.)

Sale of Rum without Licence—Insufficient Evidence.

THIS was an appeal from the decision of Mr. FRASER, S.J.P. The facts are sufficiently disclosed in the judgment.

BEETE, J., gave judgment as follows:—

In this case the Applicant for Review, Cheesewright Josiah, is charged with selling Rum without a Licence, is convicted of having done so contrary to Ordinance 10 of 1851, and is fined $48 and costs. The latter part of the conviction is not authorised by

Ordinance No. 19 of 1856, which enacts that the order of imprisonment for want of goods to distrain is to be granted after a formal return to that effect, while the order of imprisonment is here made at the same time and in the same conviction. This is such an illegality that if any question arose as to the order of imprisonment, I should have no hesitation in quashing the conviction.

As the fine however has been paid, pending this Review, I shall treat the latter portion of the conviction as surplusage.

But coming now to the substance of the case as it appears on the Magistrate's Record, I think there is such a total absence of anything like evidence of the offence charged or of any offence at all, that I feel bound to reverse the Magistrate's decision.

The evidence shews that the bottle of Rum came from the Shop of De France who is a Licenced Retail Dealer, and in whatever passed between Defendant and Bacon, it seems so strained an inference that a sale of Rum took place from Josiah to Bacon, as to be almost absurd.

On looking into the evidence of Yankee and Simon who are the principal witnesses against the Defendant, I find that neither of them says that he actually saw any money pass. Yankee says,—"I "saw Bacon put his hand into his pocket and apparently take "out something, *i. e.* money, which I saw him hand to Josiah "Cheesewright." Simon says,—"Then I saw John Bacon put his "hand in his pocket and hand over something to Josiah Cheesewright."

But taking for granted that money did pass, might it not have been given to Josiah as Bacon's messenger or agent to pay De France for the Rum?

On the whole, it seems to me that the most that could possibly be made of the case supposing the evidence for the prosecution to be entirely correct, would be a suspicion against De France of having committed a Breach of the Sabbath Ordinance.

I therefore reverse the decision of the Magistrate with costs.

ANTONIO DE FREITAS AND ANTONIO FEREIRA

Versus

T. G. WIGHT, REVENUE OFFICER.

4th August, 1866.

(Ordinance 14 of 1861.)

Trespassing on Crown Lands.

THIS was a case in which His Honor the Chief Justice reserved decision on the 4th of June last.

The Judge having heard the parties reversed the decision of the Magistrate *in so far* as it is expressed, to dismiss the claim with costs, and *also in so far* it confirms the seizure made by the Defendant in Review, of the Shingles, and allows the claim of the Plaintiff's in Review *as to the Shingles*; and orders them to be given up. The Defendant in Review to pay the costs of the Review.

BEAUMONT, C. J., gave judgment as follows :—

In disposing of this case which I am now called upon to do, although I had hoped that some arrangement would have been made which would have relieved me from that necessity; I must advert, in the first place to a collateral question which was discused upon motion, calling on the Magistrate to send up to this Court the papers.

That question was, whether or not in cases in Review before sending on the written proceedings and documents required for the purpose of Review, and which in the leading Statutory provision on the subject (S. 25 of Ord. 19 of 1856) are styled "Extracts from "the Record Book," the Magistrate is entitled to require payment by the applicant in respect of those papers, of the fees payable to the Magistrate's Clerk for "Copies of evidence or of any Document." It was a little curious to find such a question raised in the face of the uniform practice to the negative. It was, however, rested on some supposed effect of the late Ordinance providing for payment of fees by stamps; but I was, and I remain clear that that Ordinance has no bearing on, and made no change upon this point; that the practice has been correct; and that this new claim is not sustainable in law.

The proceedings brought under Review are those had upon a claim made on behalf of the Applicant in Review, for a considerable quantity of Shingles and Staves seized by the Revenue Officer of the upper Demerary River, in alleged pursuance of the Crown Lands

Ordinance, as having been cut on Crown Lands, and of the punt in which the Staves and some of the Shingles were found. That claim was sent in addressed to Mr. Wight, the seizing officer, and to Mr. Jeffrey, who is described in it as Stipendiary Magistrate, in charge "of the upper Demerary River District, and as such perform- "ing the duties of Superintendent of Rivers and Creeks," and upon it ensued the proceedings before Mr. Jeffrey, which resulted finally in an order by him dismissing the claim with costs and confirming the seizure.

From that order the Claimant appeals, and his first ground for seeking a Review of it is, that his claim has not been adjudicated upon "at or as near as practicable on the spot where the alleged "trespass was committed."

The alleged trespass was committed a long way up the River. The proceedings in this claim were in fact, had in Georgetown; and I suppose there can be no doubt that so far they were irregular, and not in pursuance of the provisions of the law which certainly did not mean the test of practicable nearness to the mere convenience either of the Superintendent or of professional gentlemen; and no other reason is here suggested. Still I have no doubt, that in a proceeding of this nature at all events, for it is not a criminal or even a penal one, the benefit of such a provision may be raised, and in this case not only does it not appear that the Claimant objected to the proceedings being had in Georgetown, but it was admitted that they were so had with his consent; and therefore on this ground alone I cannot admit the Appellant's objections. I should add that, if this objection had been that the proceedings took place *out of the Superintendent's District* the case would have been very different; for nothing is clearer than that a Magistrate or Judge, to whom a Local District is assigned for the exercise of his functions, must exercise them *in* as well as *for* that District. But that is not the objection here taken, nor perhaps are the grounds on which it might be urged, sufficiently apparent or clear, and certainly it is an objection which in a case of this nature, an Appellate Court would be loth to allow in favor of a party who acquiesced in the irregularity below.

The 2nd reason and the 8th are in effect the same—viz.: That the Magistrate had not in fact adjudicated on the claim, because "he abstained from giving his judgment" therein.

Now, "judgment" here is no doubt used, not in a technical sense as an "adjudication," but in a popular sense, meaning the reasons or exposition of his decision. But however desirable it may be, and often is, that there should be some explanation more or less, full of the *ratio decidendi*, it is not obligatory in the absence of some express law to that effect. Sometimes it is even undesirable; in some cases (though certainly not in this case) it would be an idle

waste of words or even something like a throwing of pearls before those who might be ignorant of their value as swine; it may be often practically inconvenient; and indeed I think Mr. Ross in taking this objection could hardly have remembered the almost classic advice of the old English Judge to a Colonial novice whom he recommended to give his Judgments fearlessly, but never to give his reasons. At all events, Mr. Jeffrey's adjudication dismissing Fereira's claim and confirming the seizure, was a sufficient adjudication without any further "Judgment" or reasons.

The third ground alleged, is also one that I cannot act upon.

It is said that Mr. Jeffrey was not the Superintendent of Rivers and Creeks having jurisdiction in this case. I must own that I do not know how this may have been, for though there did seem to be some peculiarity about his position as stated, the facts were really not brought before me in a way which would suffice to sustain them, even as against the ordinary presumption, which prevails, *primâ facie* at all events; that one acting *defacto* in a Judicial capacity fills such office regularly. But here the Appellant is stopped from this objection, even if it could otherwise prevail; for he himself adopted Mr. Jeffrey as his Judge, and made this claim now in question before him expressly as "Stipendiary Magistrate "and performing the duties of Superintendent of Rivers and Creeks."

It is true that it was argued that he was *compelled* to resort to him as in that capacity. But even if that could loose him from the estoppel of his own act in this respect, that surely was not so. He had a whole armoury of alternatives; the natural one being an interdict, and (to say nothing of any other special application to this Court) he might if this objection were sound, have his remedy by action against Mr. Wight, Mr. Jeffrey, and every person acting or claiming with or under them.

I may pass over the 5th and 7th reasons by saying as to the 5th, that I do not think there is here any question of title, such as would oust the Magistrate's jurisdiction even if the ordinary rule on that subject would apply to a proceeding of this nature with regard to a trespass on Crown Lands. The question which has approached most closely to one of title was one of boundary. Questions of boundary may sometimes be matter of "title" in this special sense, but they often occur as that in this case (but which was in fact removed by the admission of the Respondent's Attorney) occurred as mere matters of fact. As to the 7th reason, supposing then, Shingles, &c., had been cut on Crown Lands by mistake; mistake would be no excuse for trespass in a civil proceeding, even if it be so in any measure upon criminal or penal proceedings; but still less could it give to the trespasser a right to persist in his mistake by insisting on the surrender of property which is not his.

The 9th reason calls for no special observation except as it aids the somewhat narrow terms of the 6th, and these, which are the only ones left to be noticed, when considered together, raise the real question proper for solution in the case, viz., whether there was any foundation in fact for the seizure which has been confirmed by the order appealed from, or whether for want of such foundation it is not illegal, and the Appellants' claim such as must be allowed.

Now, this is, in the first instance a question of evidence; and bearing in mind the unwillingness of Courts of Appeal to re-consider questions of the weight of evidence, I have spoken of the 6th reason of Review, which puts the matters in this particular light as somewhat narrow. But when I consider the particular features of the law now under consideration, the serious importance of the interests which sometimes, as in this case, are involved in it, the summary nature of the seizure and condemnation, and the anamolous provision which, in all cases which either actually fall within the Ordinance or in which parties in order to avoid resorting to an interdict may resort to it, throws upon the parties whose possessions have been seized, the onus of making out their claims. Seeing that the whole foundation on which such seizure and proceedings are made to rest, are matters of fact as to trespass on specific lands, and specific acts done. Considering all this, I cannot doubt that I am bound to take into consideration and Review the facts and evidence on which these proceedings rests, that otherwise, I should in fact be nullifying the right of Review. So doing, I have come to the conclusion that the Magistrate's decision was wrong, and that the Appellant's claim ought to be allowed in the main.

The primary question of course is, whether these articles were the produce of Crown Lands.

Now, this question no doubt, at first involved a question of boundary, while the evidence of boundary adduced on behalf of the Claimant appears to me totally worthless, based as it was solely on what is called a "diagram," which appears to be, as is very common with these diagrams, a mere fancy sketch, or at most, a rough delineation from hearsay data of an assumed area.

The Attorney for Mr. Wight, however admitted before the Magistrate, the accuracy of that plan, or at least the boundary in question as spoken to by the Surveyor and the other witnesses. So that the only matters remaining for proof is that the Shingles and Staves in question were cut on the Achayma lands within that boundary.

Now, as to the Staves, which appear to form but a small part of the property in question, the Claimant has not given us a word of evidence; and therefore, the onus being on him by Statute, whether that defect is from oversight or any other cause, his claim fails as to these, and also as to the punt in which they were found.

But as to the Shingles, I consider that he has made out a good case; not uncontradicted it is true, but still so strongly supported that I must admit his claim. In the first place the witnesses Hudson, McTavish, Van Lange, Vandermaack and Wilson, appear to me to make out a clear case; the only discrepancies in their evidence that I think it necessary to notice being as to the amount of Wallaba remaining on the Achayma Lands. But these discrepancies are, in my judgment, sufficiently harmonised by the conclusion which I draw, that the wood has been no doubt cut out for the most part, and that which is left is thinly scattered, but that still, there does, or did remain Wallaba amply sufficient to produce the Shingles now in question.

The most direct witness in contradiction of the Plaintiffs' case is a Coolie named Monderalli, but without contrasting his evidence with that of other witnesses in other respects, he is so directly discredited by the evidence in rebuttal of Messrs. Gilbert and John, that I must discard his statement.

There remains the evidence of Mr. Wight and of his boatman Austin; but the utmost to which it comes is this, that they saw traces of shingle-cutting on Crown Lands, and that in so far as they went over the Achayma Lands they saw no such traces there. But seeing that they were both strangers engaged in making a partial survey; that the whole bush is said to be full of "Buck Paths;" that Van Lange and Fereira both give a very different account from Mr. Wight, of his explorations; that Van Lange insisted to him at the time that the stumps and shavings which he pointed out beyond the boundary line as being new were really old; that at the same time (as Austin says) there were some fresh Wallaba stumps observed within the admitted boundary; that the Claimants' witnesses in chief, admit that to find Wallaba on the Achayma Lands they have to search about, even for days; I think I should be setting this evidence of Wight and Austin far too high if I were to allow it to rebut those of the Claimants' witnesses, and that in the presence of the undoubted fact that the Shingles in question were seized on the Achayma Lands.

Having decided thus far in the Appellants' favor, I must take notice of an objection which was urged by the Respondent, viz., that the Claimant could not succeed, because he had not *himself* cut the Shingles, &c.; that Sect. 42 of the Crown Lands Ordinance only gives to the person who has actually cut them the right to claim them. This point was urged before the Magistrate as a preliminary objection and decided in favor of the Claimants, and I desire to be understood not to adjudge or anticipate any question which may be raised, as whether in such a case the point so adjudged is open to a party before the Court only as a Respondent, and against whose contention it has been decided in the Court below. I do not need to express

any opinion on that question, because I feel no doubt that on the point contended before the Magistrate his decision was right. I think it would be an extravagant construction of the Section in question, to hold that the Claimants must *naturally* have cut the Shingles, &c. The familiar maxim *qui facit per alium facit per se* is quite ground enough to entitle Fereira and de Freitas to claim Shingles cut by the workmen whom they employ, and that not the less because in the first alarm of the threatened seizure, he tried to shuffle out of his true position, and threw the affair upon his men.

I am not inclined to touch the Magistrate's decision further than I can help, seeing the various peculiarities of the case and of his position in it. I therefore shall not reverse the order generally, and myself confirm the seizure *pro-tanto*, but I reverse his order in so far as it is expressed, as a dismissal of the Appellants' claim with costs, and as a confirmation of the seizure of the Shingles. The Magistrate's order will then, in so far as it is valid, continue to operate as to the Staves and the punt. I allow the claim in so far as relates to the Shingles, and I order them to be given up. Considering the partial success of the seizure as to the Staves and the consequential success as to the punt, I think that I ought not to make Mr. Wight pay the costs in the Court below, but that the equity of the case will be met by leaving each party to bear his own costs in the Court below, and giving the Appellants their costs of this Review.

N. J. DARRELL, COMMISSARY OF TAXATION

Versus

ANDREW DAY.

12th January, 1867.

(Tax Ordinance 8 of 1866.)

Licence for unconsigned goods on board ship—Construction of Statute—Defective charge.

THIS was an appeal from the decision of Mr. JOHN BRUMELL, Police Magistrate, who dismissed the charge. The proceedings in appeal are somewhat remarkable, inasmuch as the Chief Justice, while affirming the Magistrate's decision, varied the grounds on which that decision was based.

BEAUMONT, C. J., gave judgment as follows :—

In this case, the Appellant in Review seeks to establish against the Respondent, a penal breach of the 13th Section of the Tax

Ordinance, which runs as follows—"Every Master, or Supercargo of "a vessel, or other person on board, having goods for sale not "consigned to some person holding a store or shop licence, shall "be bound to report such goods at the Custom House, and to take "out a shop licence for each voyage, and to pay for the same the "sum of $20." The Respondent, it appears, is the Master of the Brig *Lone Star*, which arrived in Georgetown from Nova Scotia with a cargo of Lumber, consigned to Mr. George Chapman, by whom the cargo was sold afloat; he having no store or shop licence.

The charge, which in this state of facts, was brought by the Appellant, was dismissed by the Magistrate; from that dismissal Mr. Darrell appeals, and upon full consideration of the case, I have come to the conclusion that I must modify the order of dismissal, so as to prevent it from operating as a dismissal upon the merits.

The Magistrate's order is in the following terms—"Dismissed; "charge not proved." Passing over the informality of the order, and taking it to be valid, although informal, it would appear to be a dismissal of the case upon the merits, and would thus be final. Now, although I consider that the charge must be dismissed, I come to that conclusion on grounds not touching the merits of the actual case, but on the ground of the charge itself being defective in a material particular. It is true that in such a case, if rightly understood, the dismissal of it, even on the merits, might not be a bar to a conviction on the amended charge; but inasmuch as the main question on which the dismissal seems to have proceeded has been argued before me, and there would be a danger of my order being mis-understood, if I were to leave the order of dismissal as it stands. It must be modified in order to secure to the Appellant the opportunity, if he thinks fit, of renewing the charge in a more accurate form.

The main question raised before me is, as to the true construction of the Section in question; for although the order is expressed, "dismissed, charge not proved," it would appear that such conclusion was not come to upon any conflict or defect of evidence considered only as to the facts, but upon applying the evidence to the law in question. It is true that Mr. Chapman says in one part of his evidence, that the goods were "not for sale," but I think the context clearly shews that he means they were not for sale by the Captain, and that there is no question as to the material facts of the case considered by themselves.

But the difficulty is, no doubt, considerable in putting upon the Section in question any clear and natural construction. It is indeed, a most curious structure, and as one difficulty in obtaining a clear apprehension of it subsides, another appears in the Kaleidoscope. The main point on which this case depends, is one on which I am

by no means surprised that the Magistrate should have come to the conclusion which he appears to have done; but after having given the best consideration in my power to the Solicitor General's arguments, and those of Mr. Darrell, I have come to a different conclusion. I cannot indeed, say with confidence, but perhaps with as much confidence as could be felt on the meaning of the Section, and so far clearly, that, I must give the Appellant the benefit of it.

The question is, whether or not a Ship-master falls within the Section when goods are in his control merely as master; and though imported for sale, are consigned to a resident consignee. The Magistrate appears to have thought that the Master must have the goods entrusted to him for sale, and beyond question there are difficulties in any other conclusion. It is an extraordinary thing in the first place to affix to a Ship-master the obligation of knowing whether or not his cargo is for sale, a matter with which he has no sort of concern, and often can have no sort of knowledge. And when we observe that not only the Master, but the Supercargo, or "other person on board," (these latter words being strangely introduced between the words "vessel" and "arriving"), are made liable by it; the Section seems still more extraordinary and inconsistent, except upon the construction adopted by the Magistrate.

It is true, that the words "having goods for sale" might seem grammatically to relate to the Master or Supercargo, or other person; and if those words stood alone, and their grammatical structure was clear, no doubt the action could only apply to Masters, Supercargos, or other persons who, themselves, had the custody of goods entrusted to them for sale, or of goods belonging to them, and imported for sale. But, unfortunately, grammar cannot be depended on to guide us through the maze of this Section; for, not only is it doubtful on attempting a careful examination of the Section, whether the word "having" relates to the vessel; but however that may be, the following words, "not consigned to some "person holding a store or shop licence," seem clearly to shew that the Section contemplates, and includes the case of goods consigned to persons *resident* in the Colony. These words are so clear and prominent that it seems impossible to adopt a reading which shall make them insensible, which would be the case if it were held that the Master, Supercargo, or other person on board must be entrusted with the sale of the goods in order to come within the Section; and the only way of giving to them full effect is, to construe the Section as providing for, and at all events, including cases when the goods are consigned for sale, to some person within the Colony, but not having a store or shop licence.

Still, it might be necessary to control the apparent force of these words, in order to prevent such gross hardship and incongruity as would arise from this construction, if there were no prospect of

softening and harmonising them; for it never could have been the intention of the Ordinance to impose on persons having no sort of concern, or knowledge of, as to the destination of the cargo, or the position of the consignees, the obligation to take out this licence. I suppose that few ships arrive in the Colony that have not some goods on board for some person who does not hold a store licence, and it is therefore, important to find some reasonable interpretation of the Section giving proper effect to the words, "not consigned to "some person holding a store or shop licence."

The general scope of the Ordinance, so far as it relates to shop licences, will assist, I think, in seeing the way by which these difficulties will be met as they may arise, consistently with the interpretation necessary to give such effect to those words. The 13th Section is plainly supplementary to the provisions for licensing stores. I do not see that anything turns on the question of retail or wholesale dealing; but under Section 9, all persons occupying a place where goods are sold, are required to be licenced; and this provision might well be evaded by any one, who should merely have a counting-house, and should there, or elsewhere privately sell goods consigned to them to be delivered afloat. I conclude that it was to guard against this case, that Section 13 was enacted; that it cannot reasonably be applied to the case of any chance packages which might come in a general ship, or under the care of a passenger; and that the words "or other person," should be taken with "Master or Supercargo," to mean other persons in a similar position, having the responsible charge of the cargo. Such a construction, when arrived at, will make the provision reasonable and intelligible, and if any Master, Supercargo, or other person under whose care the cargo shall be, fails to comply with its provisions, he would incur the consequent penalty.

I apprehend that in this, as in other similar cases, it would be necessary to shew that the goods *were for sale*, and also that either knowledge of the fact itself, or of circumstances from which to infer, or presume it should be brought home to the party charged. It is on this latter point, only, that I should have felt some hesitation as to the merits of this case had they been actually before me. But I do not understand that the Magistrate's decision turned on this point, and although if the charge had been formally correct, I should upon determining the point of construction, to which I have adverted, have remitted the case for his re-consideration, or further evidence on the merits, it would be out of place to do so, when the charge must be dismissed on formal grounds; but I wish to guard myself against being taken to have determined any other point as to the true construction, or meaning of the Section, or the merits of the case, than that main one which has been argued before me. I do not mean to determine, nor could I porperly determine, the merits of the case, though I, probably,

should not have modified the order of dismissal, but for the effect of the main question which was argued before me, and on which, therefore, I have thought it necessary to decide.

The formal objections taken to the charge were several. One was, that the Respondent is charged with not having provided himself with a "Ship-master's or Supercargo's Licence," whereas, the Ordinance calls it a "Shop Licence;" but I think I ought not to treat this as a fatal error. It is true that it is a discrepancy, but I think it would be requiring too much nicety to allow it to invalidate the charge. The reference which it contains to the Statute, makes the meaning clear as far as the law is clear, and in a loose sense the licence may be called, (as indeed it is called in the margin of the Ordinance) a "Ship-master's Licence." It is, however, worth observing that, the more inaccurate and confusing an Ordinance is, the more important it sometimes may be, to follow in penal charges, as far as possible its phraseology. Another objection was the mode in which the consignment is alleged at variance with the fact; but that variance was not material, and I should not dismiss the charge on account of it.

The fatal objection however is, that the *Lone Star* is said to have arrived, not "in the Colony," but in the Port of Georgetown. Now, whatever the object of the Act was, I think the words, "arriving "in the Colony," must be taken to mean arriving *from some place beyond its limits;* but when it is said that the *Lone Star* arrived in *the Port of Georgetown*, that by no means, means that she arrived there from beyond the Colony's limits. It is true, that she came in fact from Nova Scotia, but no evidence will help a defective charge, except sometimes by explaining an obscure one. Mr. Darrell argued that the statement of her bringing a cargo of Lumber would help this, but I cannot accede to this argument. Again, it is true that to the "Port of Georgetown," is added "County Demerara, Colony of British Guiana;" but that I think must be taken as matter descriptive, as if it had been properly expressed, "Georgetown, in the County of Demerary, in the Colony "of British Guiana." If the *Lone Star* arrived here from Berbice, this statement as to her arrival would have been perfectly correct; yet, the Master of a vessel coming here from Berbice, could *not* be exposed to such a charge as this. Therefore this charge must be bad on this ground, and on this ground it must be dismissed.

I do not think it is a case for costs. It appears to me that a substantial case appears against the Respondent on the merits, and the Appellant is entitled to have the order of dismissal so far modified as to enable him to renew the charge in a better form if he shall be so advised.

MANOEL FERREIRA *v.* GOODLUCK Mc INROY.

19th January, 1867.

(Ordinances 22 of 1862, 16 of 1865.)

Plantain stealing distinguishable from common larceny—Practice with regard to letters from Magistrate to Judge.

THIS was an appeal from a decision of Mr. J. D. FRASER, S.J.P., who had convicted the Appellant on a charge of simple larceny of Plantains, and had sentenced him to punishment under the provisions of Ordinance No. 16 of 1865.

BEAUMONT, C. J., gave judgment as follows :—

This is a case of Review in which it is quite clear that the conviction must be reversed, or as it would be more correct to say, in which the *sentence* must be reversed, for conviction there is none whatever, the only words appended by the Magistrate as in the nature of a conviction are as follows—"sentenced to be imprisoned for one "month with hard labour in Georgetown Jail, and to receive during "that term of imprisonment 39 lashes with the cat on his bare "back at Mahaica Station,"—and of course the absence of any conviction would alone render this wholly inoperative as a judicial sentence; for the primary and essential part of a penal judgment is, that, it must adjudicate on the offence alleged and in respect of which sentence is imposed.

But even if this essential defect were overlooked, and I were to do what I have no right to do, viz., to supply an adjudication that the Appellant is guilty of the charge brought against him, the defect would still be incurable, for, passing over the fact that the charge is one of simple larceny, treating the Plantains as chattells which are the subject of a mere theft, and the fact that the evidence is wholly inconsistent with the charge, the sentence awarded is one beyond the power of the Magistrate to inflict for the offence charged. There are only two Ordinances under which such a punishment can be inflicted upon Summary Conviction, by a Stipendiary Magistrate, viz., Ordinance 22 of 1862, and Ordinance 16 of 1865. Those provisions were, no doubt, specially enacted to put a check upon what may be popularly called plantain-stealing, and it may seem at first sight that the popular phrase may have caused the Magistrate to treat as falling within those provisions, a charge simply of stealing Plantains. But, perhaps, the phrase "plantain-"stealing" is used even popularly to mean the same thing as the special law guards against, which is not the mere stealing of Plantains as by a common larceny, but a special offence which

(though it would not be a theft at all, but for the Statute,) is by the provisions in question made an offence punishable with particular severity, viz., the offence of feloniously taking, and as the Ordinance calls it, stealing *growing Plantains*, and it is defined thus—"Whosoever shall steal, or shall destroy or "damage with intent to steal any Plantains, Yams, Cassava, or "sweet Potatoes growing in any land open or enclosed, not being "a garden, orchard or pleasure ground or nursery ground, shall on "conviction thereof." That is in Section 32, and the following Section goes on to provide for the case of persons being found armed with intent to commit an offence under Section 32. Such offenders might for a second offence be punished under either of these Sections, as the Appellant has been sentenced in this case; but the Ordinance of 1865 has provided that offenders against either of the above Sections may be punished for the first offence in the mode previously prescribed for a second offence.

Nothing can be plainer than that before a Magistrate can impose a sentence attached to a particular offence, the offender must be first accused and then convicted of it, but in this case the Appellant has not been convicted of any offence, and has not been accused of any offence under any of the provisions in question. I may add that the mistake is so palpable that I have been relieved from a difficulty which I should have felt had the case been open to argument, from the circumstance that the Complainant below has not been served with any notice beyond the verbal notice of his intention to appeal given at the hearing. Now, although I have uniformly acted on the principle that this Court cannot entertain a Review except upon notice to the other side, I conceive upon looking to the provisions of the Ordinance with regard to Review cases that the *strict requirements* of judicial procedure must be taken to be satisfied by a verbal notice given at the time of hearing, which appears here to have been given and which may seem technically sufficient to operate as notice. But, beyond doubt, cases often arise in which this would not practically effect the purpose of notice and I should freely exercise my discretion by requiring a further and written notice to be given in any case in which there might seem to be a chance of hardship, or failure of justice from want of it.

In this case, I have the less difficulty in dispensing with any special notice to the Complainant, because the Magistrate has, himself, communicated to me the view which he relies on to support the sentence. I am the more careful to mention this, because, whenever any private communication is made to a Judge with regard to judicial business, the recognised and only proper course is to notice that in public, and if it be either of a nature improper in itself, or in any degree calculated to affect the case of any party, to hand it over, or make it known to the other side. For the only

mode in which a third party can submit his views to the Court is as *amicus curiæ*, while an *amicus curiæ* is not recognised except on coming to the bar of the Court, so that all private communications to a Judge, on judicial business however legitimate in their object, are irregular and undesirable; at the same time, I not only feel assured that the Magistrate in this case had none but a proper intention in communicating with me, but perhaps there may be exceptional cases, such as where a Magistrate may think that the Court above is being misled, in which such a communication may be allowed on the understanding that it will be publicly noticed, and generally handed to the other side.

In this case, I have not thought it necessary to make any communication to the Appellant's Counsel, because, while I have been made acquainted with the grounds on which the Magistrate appears to have relied, they do not appear to me in any degree to vary my conclusion. In the first place, he appears to have thought that the Ordinance of 1865, had not been called to my attention. That was a mistake, as it was also a mistake to think that it, in any way, sustained the sentence; for its whole effect is to make offences which might have been punished with flogging, under Sections 32 and 33, of Ordinance No. 22 of 1862, upon a *second* conviction similarly punishable for a *first* offence. The essential circumstance of this case being that these are offences of which the Appellant *is not accused*. In the next place, the Magistrate urged that the evidence shewed that the Appellant had committed one of those special offences, and that as the Legislature intended them to be punished by flogging, he was bound so to sentence the Appellant. But it surely can hardly require to be said that no evidence can cure a defective charge or extend a minor one. Indeed, there can be no evidence properly so called to that effect, for the statements of witnesses are no evidence, except as to the charge upon which they are sworn, so that any of these witnesses might have falsely sworn, with impunity, upon this charge of simple larceny, exactly what they pleased as to the question which seems to have been the main question in dispute, viz., whether the Plantains spoken of were cut on Complainant's land or not. Indeed, it would be against the first principles of Justice as of law, to convict a man of a special offence upon a charge of a different one; *a fortiori*, upon a charge of a minor one, when the Legislature may say that every theft, or every theft of Plantains, is to be punished with flogging, no doubt the Magistrate's duty will be to act accordingly. But it has not said so. If it could be supposed that the Legislature intended to pursue any offence otherwise than by a due course of judicial proceedings, it would be found necessary, no doubt, to effect such an object by some apt means other than we have here to do with. But in truth, the meaning and the object of this law, is very plainly to visit the offences, which are particularised, with a

special punishment to be awarded in due course of law, i.e., upon a proper charge of such an offence, duly investigated and adjudicated upon, but by no means to authorise the Magistrate to punish a supposed offence, in any mode inconsistent with this due procedure. There is not any difficulty in the supposed case of a minor, or an inaccurate charge being brought under circumstances which would justify a more stringent, or demand a more accurate one, subject to the ordinary considerations affecting Magistrate's action in such cases. He has only to forego the examination of the minor or incorrect charge, or to dismiss it, taking care that, in the latter case, it appears to have been dismissed for want of prosecution so as not to operate as a bar to further proceedings. But it would be as monstrous to say that if a man is charged, simply, with a petty larceny, he may therefore be convicted of a special statutory offence, and sentenced to the heavier punishment attached thereto, as it would be to say that if a man were indicted for larceny or assault, he could be convicted of, or punished as for burglary or rape, or an attempt to maim or to murder.

I do not enter on the question as to whether the Appellant has been guilty or not, of any offence under either of the Sections in question. I could not properly enter on an enquiry as to any matter open to question, and as to which he is not accused, and therefore I can only say that he is entitled to the ordinary presumption of innocence.

MANOEL GOMES *v.* RICHARD GREEN.

20th February, 1867.

(Ordinance 33 of 1850.)

Trespass—Bonâ fide claim of right.

THIS was an appeal from a decision of Mr. Stipendiary Justice BAIRD, who convicted the Appellant of wilful trespass on Plantation *Friends*, (Berbice River District,) of which Respondent was Manager. The proceedings were referred back to the Magistrate with directions to him to ascertain the *bonâ fides* of the Appellant's claim of right to enter on the land in question. The Magistrate thereupon took further evidence, including that of the Appellant on oath.

NORTON, J., gave judgment as follows :—

In this case, the Applicant for Review was convicted of having wilfully trespassed on the front lands of Plantation *Friends*. His defence was that the land on which the alleged trespass took place was the property of his employer Sylvester Gomes, and that it was by his order and authority he had gone thereon. That the title to the land in question was at issue in an action instituted by the said Sylvester Gomes against the Complainant (the present Defendant in Review) and that consequently as a question of title arose the Magistrate had no authority to adjudicate thereon. He referred to Section 10 of Ordinance 33 of 1850 which enacts "that it shall not be lawful for any Justice of the Peace to determine any case of trespass in which it shall appear that the right or title in and to the lands, buildings or premises wheron the trespass is alleged to have been committed, shall be at issue between the alleged trespasser and the party in possession." In support of his statements, he called Sylvester Gomes, who deposed that the act complained of had been done by his order; that the land in question was his property; the same having been bought by him five or six years ago; in evidence of which he produced a grosse copy of a transport which, though it does not prove, most certainly does not disprove the claim set up, any more than the original diagram does of which some copy that does not even purport to be authenticated was offered in evidence by the Complainant, with a view, no doubt, of negativing the title relied on. The Magistrate discrediting the evidence for the defence, over-ruled the objection treating it as altogether unfounded, and assuming that the *locus in quo* was not, and could not be included in the lot to which such transport and diagram referred, and that consequently the claim of right set up was a mere pretence for the purpose of arresting the exercise by him of a lawful authority. The Magistrate having so decided, the question is, is his decision subject to Review? That it is so, is shewn by the older authorities as well as by the most recent decisions, among which are Regina *v.* Stimpson, and Regina *v.* Peak, Cox M. C., vol. 2. p. 320, and Legg *v.* Pardow, Cox M. C., vol. 1. p. 241, which establish this principle—That though in a case of trespass when title is actually set up, it is for the Magistrate to judge whether it is so set up reasonably and in good faith; yet if he decide that such is not the case, that, in other words, the claim of right is not made *bonâ fide* and with some shew of reason, and that consequently he has authority to adjudicate on the matter, such decision will be reversed, if in the opinion of the Superior Court it proceeded on insufficient grounds. But if he should determine that the question of title was *bonâ fide* raised, and that his jurisdiction was consequently ousted, although no evidence thereof was offered, and though in fact title was not in dispute, his determination would not be disturbed, even though the Superior

Court should on the same facts have arrived at a different conclusion. The rule may be briefly expressed thus—That the Magistrate's determination will be over-ruled, if he improperly decide that this jurisdiction is not ousted—that it will not be disturbed, if he decide that it is.

Having shewn that the Magistrate's decision on the question of *bonâ fides* is not conclusive, the next question is as to its correctness. Looking at all the circumstances of the case, that the Defendant formally protested against the Magistrate's summary adjudication; that the evidence of Sylvester Gomes showed that the act complained of was done in the assertion of a claim of right under a supposed authority; that the original diagram now before me, and the transport, which is in evidence, are not inconsistent with such claim, the diagram appearing to support, rather than otherwise the title set up. I am of opinion that in deciding as the Magistrate has done that the title was not in question, in such a manner as to preclude his dealing with the case, his decision cannot be sustained. In Regina *v.* Speed, 1 Ld. Raymond 583, Ld. C. J. Holt said—"Without a doubt if the Defendant has but a colour of "title, the Justices have no jurisdiction; the intent is to punish "rogues and vagabonds, and not persons who by mistake exceed "what the law warrants." Paley says, p. 118, 4th Edition,—"That "if a colour of title appears to be in question, however *weak the claim* "may appear to be, it will be sufficient to oust the summary "jurisdiction." The same authority at p. 121, advises Magistrates to confine their enquiry to this point—Was the act done under supposed authority, and was the plea honestly set up, and not for the mere purpose of screening the offender. To suspend the summary jurisdiction, the plea must be more than a mere assertion or suggestion of title.

Where it is evident that the right set up does not, or cannot exist, the Magistrate has authority to decide summarily. This was decided in Morden *v.* Porter, 1 Cox, M. C., p. 53, and Cornwell *v.* Saunders, 2 Cox, M. C., p. 184; in which latter Cockburn C. J. said—"The Magistrates must see some reasonable grounds for the "objection, before they require to give effect to it." Leat *v.* Vine 2 Cox, M. C., p. 330, shows that the mere assertion of a general right in a party himself, and every one else however honestly such claim might be set up, would be no defence to such party on an information charging him with trespass in pursuit of game. In Hudson *v.* Maciæ, Cox M. C., vol. 1. p. 470, which was decided in November 1863, it was held that the claim however *bonâ fide*, is no bar to the exercise of summary authority, if it be manifestly such a claim as cannot possibly exist. Here the Defendant showed that he *bonâ fide* believed that, he as one of the public, had a right to fish in a private fishery. In point of the law, Blackburn J. said—"Such a

"right could not exist in a non-navigable river."

As it is evident the act charged was done in good faith, there was no *mens rea* on the part of the Applicant for Review, and consequently he was not punishable criminally; the guilty intent being essental to constitute a crime, such as wilful trespass is held to be under our local Ordinance. The great maxim of criminal jurisprudence is, that guilty intent must concur with a guilty act to constitute a crime. "*Actus non facit reum nisi mens sit rea.*" This principle was recognized and acted on in a very late case, Rider *v.* Wood, and others, Respondents. Here the Court decided that *bonâ fide* belief deprived the act in question of a criminal character. Although such act *per se* was made punishable without any reference to the intent. As this was a criminal matter, the Defendant was not a competent witness, and ought not to have been examined. This irregularity alone might have vitiated the whole proceedings.

For all these reasons, I am compelled to over-rule the Magistrate's determination, and I reverse the decision and quash the conviction, and condemn the Defendant in Review to pay to the Plaintiff in Review, all the costs incurred by him in this Court, as well as in the Court below.

THOMAS HEYWOOD *v.* JOHN YOUNG.

23rd February, 1867.

(Ordinances 33 of 1850, and 19 of 1856.)

Trespass—Ousting Magistrate's jurisdiction by claim of right—Costs.

THIS was an appeal from the decision of Mr. HUMPHREYS, S.J.P., who had convicted and fined the Appellant for wilful Trespass.

BEAUMONT, C.J., gave judgment as follows:—

This is a case of a Summary Conviction, as for a wilful trespass upon the property of the Respondent.

The alleged trespass is that the Appellant, Heywood, took his boat into a draining trench of the Respondent, Young. Heywood says he *had a right* to take it there; Young says he *had not*, and Heywood now says that this contention ousted the Magistrate's jurisdiction to adjudicate on the charge as one of wilful Trespass.

I am of opinion that it clearly had that effect, and therefore the proceedings before the Magistrate must be set aside. The 11th Section of the Ordinance under which the Magistrate's jurisdiction in this case arises, (33 of 1850) expressly precludes him from determining any such case, when "it shall appear that the right or "title in and to the lands, buildings, or premises wherein the "trespass is alleged to have been committed shall be at issue "between the alleged trespasser and the party in possession." Nothing can be clearer than this Section, which indeed only follows out the general law; for independently of this provision, although the Magistrate might have jurisdiction to entertain such a case, he could only decide it in one way. It is quite a mistake to suppose that a proceeding of this nature is a proper mode of dealing with every complaint of trespass; as it is equally a mistake in another direction to suppose that any proceeding of a violent nature, or in breach of the Peace is in any way affected by the provisions of the Ordinance in question. That Ordinance provides a summary process of a criminal nature for the conviction and punishment of persons committing "wilful trespass," and the plainest principles of the common law and common justice, would of course prevent a Magistrate from convicting a person of such offence who acted by mistake, or oversight; *a fortiori*, when he acted in maintenance of an alleged right; but it would be a monstrous hardship that cases of this latter description should be even investigated before a Magistrate; (involving as they would naturally do, every kind of question, as to the title to, and rights in, real property) the Legislature has been careful to exclude the summary jurisdiction in them altogether.

No doubt a Magistrate ought not to allow himself to be blinded by a *mere pretence* of a claim on the part of the accused person, and as it would be easy for any one to set up such a pretence of claim, he would, probably, be justified in many cases in disregarding a *mere* statement. But in order to justify the ignoring of such a claim, it must appear that it is a mere excuse, and that none of the circumstances of the case alleged, disclose any foundation for it, by which I do not mean *any adequate legal foundation;* but any foundation for a *bonâ fide* though a mistaken claim; and I should add that there appears to be here a material effect attributable to the Section referred to. For as the true effect of that Section appears to be to *oust* the jurisdiction, the Defendant, if well advised, would not plead to the charge, but would object to the jurisdiction, and if that objection were not admitted, might claim to be heard upon his own oath, or other testimony in support of it. With this sole object, therefore, the Magistrate may in such a case investigate the Defendant's objection, viz.; merely to learn that it is made *bonâ fide*. But that is the limit to which he may enquire into the claim. He has no power whatever, to enquire or determine

whether it is in itself more or less sound, probable, or mistaken. If the Defendant really acted in the belief that he had a right to do the act complained of, he is not guilty of "wilful trespass," or subject to summary process of a criminal nature.

Such being the general principle involved, I think that this case not only falls within it and beyond the scope of the Magistrate's jurisdiction, but plainly illustrates the importance of the principle. I have indeed felt some little difficulty as to whether, or not, any right in or to the trench in question, is at issue, having regard to the loose and vague language used in the statements on both sides; but I think the fair result of those statements on both sides is this—That Mr. Young claims the property in, and possession of the trench in question, and its banks absolutely, free from any such right as the Defendant alleges; and that the Defendant, on the other hand, asserts that his Father-in-Law, Quammy James, is the owner of the land adjoining the trench; that he has a "water-side," or "landing" at the trench itself; that he has, at all events, a right of way along the trench to his place, and the right to keep and moor a boat, or boats there, and that the boat in question was lawfully brought there by the Defendant, in virtue of such right, and by the leave and licence of his Father-in-Law.

Mr. Gilbert on behalf of the Respondent, discussed the merits of the claim; but that is just the thing that cannot be determined in this case, either by the Magistrate, or by the Judge sitting in Review, and who so sitting, has merely the same jurisdiction as the Magistrate has. But this, I may say, that if I had the power to determine the merits of the claim, I assuredly have not the means, and that in so far as I could form any judgment from such materials as are before me, I am not prepared to say that the Defendant's claim is sound, or unsound, more or less probable, still less that it is wholly mistaken or palpably unfounded. I do not therefore enquire whether the right alleged rests on title or user, property or servitude, prescription or licence, grant or agreement, or necessity, whether if it exists, it is large enough to enable Quammy James to licence the Defendant to do what he has done under the circumstances under which he did it, or is a privilege merely personal, or to be exercised merely personally? Whether the document put in by the Respondent as a plan or chart of the property in question, is of any value to bind the Defendant or not, or what its effect would be in that case in support, either of Complainant's, or the Defendant's case,—all these questions, and others suggest themselves as likely to arise in a dispute of this nature. Their solution may be simple or intricate; but in either case, they are not the less foreign to the sphere of the Magistrate's summary jurisdiction, in cases of wilful trespass. It is enough that circumstances appear, which shew that the claim is genuine. In this case, it appears that James has land on the bank of the trench; that he has, or claims a "water-side"

or "landing" in the trench; that he has been accustomed to have access to his land by the trench, and that he gave the Defendant leave to bring his boat there, and under such circumstances, I can feel no doubt that the claim is made *bonâ fide*; that the act complained of was no "*wilful trespass*," but was done in exercise of the right so claimed, and that therefore the complaint was not cognisable by the Magistrate.

The Defendant appears, however, to have been ordered to pay, not only a penalty, but (under the name of "costs," though in addition to the actual costs) a sum of Seven Dollars and seventy-two cents, by way of expenses. I am not aware of any ground on which this can be justified, and though the point does not actually arise in this case where the ground of reversal is entire want of jurisdiction, it deserves notice, so that a similar defect may be guarded against in future. It leads me moreover to make this additional remark, that, it is much to be regretted that persons should have recourse to penal process in a case of this kind, not only because the law does not, and could not allow it, but because it does give the party alleging such a grievance, ample means of obtaining civil redress; of course, if such a grievance is merely nominal and casual, it does not deserve comment; on the other hand, if it arises from a wanton, wilful trespass, I have already pointed out that the law in question applies. But assuming it to be an encroachment deserving of attention, and yet arising out of a *bonâ fide* dispute, surely it is the fair and reasonable, as it is the only lawful course that he should protect himself, either by some preventive measure, or by civil action, as other rights are assorted and injuries redressed. It may be unpleasant—it is no doubt unpleasant—not to have everything our own way; but it is the lot of most people, and it would be most unpleasant, and a gross wrong if any one having such a matter in dispute might have his adversary before a Magistrate on a summary and penal process, as Mr. Young, would, no doubt, have thought if he had himself been summoned and fined for removing the Appellant's boat. Nor is he even shut up to proceed by action, for if he is so clearly in the right as he seems to think, he not only may sue trespassers, but (if in actual possession of the property) may exclude or remove them, or retain or cut adrift their craft. If he can rightfully exercise these rights, he will find them very efficient; if he cannot safely do so, still less can he properly, or safely prosecute such persons before the Magistrate, for wilful trespass.

JOAQUIM DE GUARA *v.* EDWARD HUGH WATSON.

23rd February, 1867.

(Ordinance 19 of 1856.)

Conviction to be sent to Review Court—Costs.

THIS was an appeal from the decision of Mr. J. D. FRASER, S.J.P. The facts are sufficiently disclosed in the judgment.

BEETE, J., gave judgment as follows:—

The charge made by the Respondent in this case against the Appellant is, "for that he, the said Joaquim de Guara, on the 4th "day of September, 1866, sold a flask of Gin without having a "licence."

No conviction is laid over with the papers, although, at the end of the proceedings there is a note apparently in the hand-writing of Mr. Stipendiary Justice Fraser in these words—"Conviction in "the office of the Sheriff." Now, it appears by another note at the foot of the memorandum of Mr. Fraser's decision that the fine was paid in Court "at once, and notice of appeal given." Surely then, the conviction, or at all events, a copy of it should have been attached to the documents forwarded to the Registrar; and in the absence of any conviction, or copy duly certified, I can only conclude that the conviction was drawn up in accordance with the Magistrate's orders—"Fined Forty-eight Dollars, including costs;" and that would be clearly bad, because the sum allowed for costs *must*, in all cases, be specified in the conviction or order, according to the express terms of Section 24, of Ordinance 19 of 1856.

This being so, the order of the Magistrate is void for uncertainty, and must be quashed, and I hereby quash it accordingly, but I make no order as to costs.

SAMBO CLAIR *v.* JOAQUIM MENDONCA.

16th March, 1867.

(Ordinance 16 of 1856.)

Stealing plantains "growing on land"—Copy of proceedings.

THIS was an appeal from the decision of Mr. J. D. FRASER, S.J.P. As will be seen by the remarks of the Chief Justice, the conviction of the Magistrate was neither affirmed nor reversed.

BEAUMONT, C. J., gave judgment as follows :—

In this case, I do not give any weight to the grounds of appeal formally alleged on behalf of the Appellant. I feel no doubt, that upon the evidence which is before me, he was rightly convicted, provided he was duly charged with the offence of which he was so convicted. As to the Constable not having been called as a witness, if he had been on the scene of action when the Appellant was arrested, though that would hardly be ground to reverse a Magistrate's decision, it might have been ground to refer the case back to him.

It was stated, however, that the Appellant was not given in charge to the Constable until sometime after the original arrest, and therefore there could be no obligation on the Prosecutor to call him as a witness. It rather lay on the Appellant to do so; and when this Review was brought before me, it was too late for me to take any steps to re-open the matter on that ground. The objection made to a defect in the conviction was also not sustained. But I much regret that upon the face of the proceedings returned to this Court, there appeared a defect of a nature fatal to the conviction. The Appellant is convicted of the offence of stealing "growing" Plantains, and the punishment awarded is that provided for that special offence. The very *gravamen* and substance of the matter therefore is, that the Plantains stolen were *growing on land*, yet it appears that the Appellant was not charged with that offence. It is plain to common sense, as it is to common law, that a man cannot be convicted of that with which he is not charged, and the very substance having been left out of the charge, the conviction must be bad.

On this point, I felt no difficulty; but I felt considerable difficulty as to whether I should act upon it in the absence of any express notice of it in the written grounds of appeal. It is, indeed, often an embarrassing question in this Court, how far points not expressly raised on the grounds of appeal, should be noticed. I do not doubt that the Court has jurisdiction to deal with such proceedings according to very law, and no doubt in reasonable measure it is its duty to take care that fatal errors are not overlooked, and (although it is true that upon the papers before me, the Appellant's case had assuredly no merits apart from his strict legal rights) yet, after referring the matter to my learned brothers, and in accordance with their opinion, I concluded that the defect appearing in this case was too plain and fundamental to be overlooked, and I felt myself bound to give the Appellant the benefit of it. One reason why I was the more disposed to take this course, was for the protection of the Magistrate, who might no doubt have been placed in an awkward position, if his sentence, that the Appellant should be flogged, had been left to take effect.

It remained, however, for me in compliance with the express requirement of the law, to state in writing my reasons for thus reversing the Magistrate's decision, and also in conformity with the usage to see the order of this Court formally embodied in, and pronounced from, a written minute thereof; and for such purpose the case stood over to this day.

In the interim, the Magistrate has (very properly) made a communication to the Registrar, stating that he has discovered that the papers forwarded by him to this Court as correct copies of the proceedings before him, are in fact incorrect in the very vital point in question, and that the actual charge *does* allege the Plantains stolen to have been "growing on lands," so as sufficiently to charge the crime of which the Appellant was convicted. This is certainly a very unfortunate accident. Of course, I cannot, sitting here, act upon anything but the proceedings as returned to this Court. But no doubt so long as the case is open to me to deal with in any respect, it would be my duty to afford an opportunity, and even to take measures for the error being duly rectified. Of course, that could only be upon notice to the Appellant, and the rather in this case, because one of the objections taken by him was founded upon a defect, which he alleged did occur in the conviction, but which did not appear in the proceedings as forwarded to the Court; and though his Counsel stated that the copy furnished to him was different, and shewed the error alleged, I held that I could only deal with the case as it appeared by the papers in the Registry; and that if the alleged error is there, he must make it appear by affidavit, before I could proceed to have it rectified.

It happens, however, that, as far as I can see, it would be to no practical purpose now to proceed further in this case. The mischief on either side is done—the whole time of the Appellant's sentence has expired, and he cannot now be flogged.

I therefore shall leave the case just where it stands, without making or pronouncing any further order in the matter, unless, indeed, either party should make a direct application to me on the subject. I do not see, that the Respondent can gain anything by such an application; and as to the Appellant, I recommend him to leave the matter where it is, and to be very thankful for the lucky (or rather, as to public justice, unlucky) accident which has led to his escape from the effective punishment, which he would otherwise have undergone.

The Magistrate in communicating with the Registrar, expresses some apprehension, lest he should be deemed in this matter to have acted in disregard of a late decision of this Court in a case similar to the present one. Such an apprehension is quite unfounded, and it would indeed be unwarrantable in me to impute conduct so unbecoming to a Magistrate, who has for many years diligently and

uprightly applied himself to the discharge of his functions, and that upon no better grounds than that of a mistake, which no doubt was accidental, and which (although it illustrates the importance of that accuracy, which is really not difficult to attain, though, perhaps, still more easy to overlook) is wholly different from a wanton or perverse disregard of duty.

SERGEANT MAJOR HOWELL *v.* JOSE DE SANTOS.

16th March, 1867.

(Ordinance 19 of 1856.)

Court of Review before Ordinance 5 of 1868—Powers of.

ON the 9th March, 1867, Mr. Haynes Smith appeared for Jose de Santos, and filed an affidavit of Joseph Cleghorn, sworn to on this day, and applied for an order on Mr. John Brumell, Justice of the Peace of the Colony of British Guiana and Police Magistrate of Georgetown, to forward the proceedings referred to in said affidavit to this Court. His Honor the Chief Justice having read the affidavits, and heard Mr. Smith, ordered that notice of the application for Review, should be served on the said Mr. John Brumell, in order that he might appear at the next sitting of this Court, to oppose the granting of such application, should he think fit so to do.

The Court then having adjourned until the 16th March, 1867, the matter came on again on that day, when upon motion of Mr. Haynes Smith made, and upon reading notice of application for Review, and affidavit of Joseph Cleghorn, and upon hearing Mr. John Brumell upon such application, the said John Brumell being heard as *amicus curiæ*, and not as a party to this application notwithstanding notice thereof being served upon him by direction of His Honor the Chief Justice, made on the 9th instant, and the said John Brumell submitting to the Court, that it did not in any manner appear that the proceedings had, and taken by, and before him in this matter, were so laid and taken by and before him as a Stipendiary or Special Justice of the Peace, and alleging that on the other hand, such proceedings had not been had and taken by, and before him in that character, but had in fact been so had and taken by and before him as an ordinary Justice of the Peace, acting by virtue of the provisions in that behalf provided, His Honor refused to make any order on this motion, it not being made to appear to him that the proceedings had and taken before the said John Brumell in this matter, are properly the subject of proceedings by way of Review.

TOMSIDE DICK *v.* CHARLES BUNBURY.

6th April, 1867.

(Ordinance 22 of 1862.)

Petty Larceny—Stealing Plantains.

THIS was an appeal from the decision of Mr. DAMPIER, S.J.P.

BEAUMONT, C. J., gave judgment as follows:—

I reverse the decision of the Magistrate in this case, because I find no evidence on which to sustain it. The charge seems to have arisen out of disputes between the Appellant and Respondent, as to accounts and dealings of a civil nature, and in particular, as it seems from the Respondent's statements, as to whether or not a piece of land from which it would appear the Plantains in question were taken, was cultivated by the Appellant on his own behalf.

I am led, indeed, to conclude that it is rather in this aspect of the case that the Magistrate has dealt with it, from seeing the terms of the sentence imposed.

Now, it is at all times very important not to confound disputes of a civil nature, whatever wrong they may involve in the way of trespass, with criminal acts. In cases of embezzlement, indeed, and in some others, the distinguishing line is sometimes difficult to hit, and to follow; but in cases of theft, it is clear enough; and in this case I find nothing in the evidence as to the dealings between the parties, on which to found a criminal charge; as to the actual taking and *corpus delicti*, I find some difficulty in ascertaining of, or in what it is supposed to consist. It appears, indeed, that the witness Rigby left eighteen bunches of Plantains belonging to the Respondent, on the dam, of which he says—"I found that the "Defendant had in my absence come and taken them away;" of which Boyd says—"The Defendant moved them in the absence of "the Manager Rigby;" and of which Elay says—"I did not see "Defendant move them, but he cautioned me not to touch them, "as they were his property." There is assuredly no sufficient proof even of a taking, to say nothing of a felonious taking; but moreover the Defendant has expressly stated before this Court, that those eighteen bunches are not the Plantains in respect of which this charge is brought.

The Respondent in his evidence, speaking from information he received, says—"That he found that the Defendant had gone on "Plantations *Somerset* and *Berks*, and taken away twenty-nine "bunches of Plantains."

This, of course, is no kind of evidence; and the only further evidence as to this other supposed taking, is that of Rigby, who says—"That there was an acre of land which Defendant had "cultivated; when I returned, I went on the land and found that "twenty-nine bunches had been cut and removed in my absence;" of Hoyd, who says—"Defendant has two beds in Plantains on "*Somerset* and *Berks;* about two weeks ago, I met Defendant and "others bringing out some Plantains from this land;" and of Joseph, who says—"Defendant owns two beds there, and on the "28th of January I saw Defendant cut fifteen bunches of Plantains, "and on the 8th of February Defendant cut nineteen bunches of "Plantains."

Now, whether these latter statements refer, or do not refer to the twenty-nine "bunches of Plantains" spoken of by Rigby, it is impossible to treat them as supporting the charge of stealing twenty-nine bunches of the Respondent's Plantains.

It is desirable that I should observe on certain points which, apart from the main question on the evidence which I have noticed, occur on the face of the proceedings. I do not know of any law authorizing a Magistrate besides imposing a fine, to order a Defendant to pay the value of articles stolen, except in particular cases, as those of stealing *growing* Plantains, &c., under Section 32, &c., of Ordinance 22 of 1862. But as the Appellant has not been charged with that offence, (which is a special Statutory offence, the essential point in which is, that the Plantains, &c., should be *growing on land*), such an order could not be supported, even if the evidence had disclosed such a case.

Nor is there any proof of the value of the articles, which would be necessary of course, either as the foundation of such an order, or of a Summary Conviction for petty larceny.

On clear grounds, therefore, I reverse the Magistrate's decision, and dismiss the complaint with costs.

DANIEL WILLIAM *v.* FERGUSON SIMPSON.

6th April, 1867.

(Ordinance 20 of 1856.)

Relating to Petty Offences.

THIS was an appeal from the decision of Mr. FRASER, S.J.P., who had convicted the Appellant in Review for having a quantity of

Rum in possession, the same supposed to be stolen from Plantation *Greenfield*. The sentence of the Magistrate was set aside on the grounds that the convictions were informal, and that he had exceeded his jurisdiction.

BEAUMONT, C. J., gave judgment as follows :—

This is a case in which I must quash the conviction appealed against, because it proceeds to impose a sentence not authorised by law.

The charge is for having possession of goods, supposed to have been stolen, without giving a good account of them.

The Appellant sought to reverse the Magistrate's decision upon the evidence, but this I should scarcely have felt myself at liberty to do; as although, no doubt, it was very conflicting, I cannot say but that it was open to the Magistrate to draw the conclusion which he has done, and therefore, I should not interfere to disturb his judgment.

But apart from that, there appears on the face of this conviction, this fatal defect, that whereas the law only authorises the Magistrate to award Thirty days' imprisonment in case the fine imposed cannot be levied by distress, the Magistrate has sentenced the Appellant in that event to be imprisoned for Two months.

On this ground, therefore, this conviction must be quashed.

On a subsequent day, BEAUMONT, C. J., gave further reasons for his decision in this case as follows :—

With reference to this case, I have received a Letter, which has been addressed to the Registrar, by Mr. Fraser, the Stipendiary Magistrate, whose decision was reversed, stating his difficulty in apprehending the ground of my decision, and requesting that I would relieve that difficulty by a more explicit statement of my reasons for such reversal; and as upon my attention being thus called to them, I find that my reasons are expressed in a mode, not only defective, but apparently inconsistent with the express provisions of the Statute Law with regard to the measure of imprisonment, in default of payment of pecuniary penalties, I am very much obliged to the Magistrate for so doing, and thus giving me the opportunity of rectifying this important mistake, by stating accurately the grounds on which my conclusion was really formed, and should have been expressed. I gladly avail myself of this opportunity, more especially as the point which I had noted for

decision is one of practical importance; and I desire that this explanation shall be forwarded to Mr. Fraser, and also that, together with his Letter, it shall be appended to the proceedings in this matter.

The point which I had noted for judgment, as to the excess of imprisonment over Thirty days, but which was erroneously stated by me in giving judgment, was that the sentence was *not good for more than Thirty days, at the utmost;* and it should have been expounded in connection with the particular form of the conviction (or as I should rather have said, *the convictions*) in the sense which I now proceed to explain.

There are in this case two separate convictions, which are mutually destructive of each other; one for the offence charged, and which proceeds to impose on the Appellant imprisonment with hard labour for Thirty days; the other convicting him in the same terms, but sentencing him to pay a fine of Twenty Dollars on or before the 6th day of April, 1867; such fine to be levied by distress and sale, and in default, the Defendant is sentenced to imprisonment for Two months, with a proviso, that it is to commence "as, and "from the termination of a certain term of imprisonment for a "certain offence, of which the said Daniel William is duly convicted "this day by me."

Now, in the first place, these convictions cannot stand together; for though, when we come to consider the second mentioned conviction, it is defective in itself, yet looking at these as they stand, as two separate, but contemporaneous convictions for one offence they cannot stand together. Each in point of form is complete and conclusive within itself; each might be pleaded separately, and each appears to impose a separate punishment. No rule is more essential to be observed than that so important and formal a document shall contain within itself plainly, clearly, and legally, the whole adjudication; and as nothing is plainer than that there cannot be lawfully two convictions or two sentences upon one charge; these two formal instruments are naturally destructive, for both being contemporaneous, it is impossible to say when considered separately, that one is good, and the other nugatory. But the point which I had noted for decision, was independent of the above, and proceeded on the assumption that the conviction (or rather convictions) might be considered together and in their substance; so considered, they would appear to amount to, and embody a sentence; that the Appellant should be imprisoned for Thirty days (which would be down to, and including the 6th of April); that he should, on or before that day, pay a fine of Twenty Dollars; that in default of payment it should be recovered by distress and sale, and in default of sufficient distress, that the Appellant should be imprisoned for Two months, to commence from the termination of the Thirty

days' imprisonment previously imposed. Thus read the sentence (which would be good, in so far as regards the imprisonment for Thirty days, if it had stayed there) fails entirely, because another material part of it which imposes the further imprisonment is bad, and thus must vitiate the whole sentence, considered as one; for as to penal sentences, it is an essential rule that they must be good in every material part, and that if not good altogether, they are altogether bad.

The grounds of holding this sentence bad as to the Two months' imprisonment are these—In the first place, the words about the commencement of the conviction, "from the termination of a "certain term of imprisonment, &c.," must, as I think, be held to mean that the Two months' imprisonment is to commence at the close of the Thirty days' imprisonment. There is, indeed, some difficulty in so reading it, but I think that construction is most in favor of the conviction, and that otherwise it would be void for ambiguity or uncertainty. But that meaning is inconsistent with the law, having regard to the facts that the Thirty days would expire on the 6th of April; that the fine was not due until that day, and in default of payment then, was required by the sentence (as by the law independently of it) to be levied by distress and sale; and was therefore not punishable by imprisonment, except (as far as the sentence provides) "in default of sufficient distress," or (under the general law) either in such default, or upon evidence that the Defendant had no goods to levy on, or that it would be ruinous to the Defendant to levy on them. Now, as the Appellant would have all the 6th of April in which to pay his fine; as the Thirty days' imprisonment would determine on that day; and as before he could be imprisoned in default of payment of his fine, then must have transpired the issue of a distress warrant, followed up by a levy and sale, or return of *nulla bona* and a warrant of commitment there upon; and as none of these acts could be effected, *until after* the 6th of April, it is manifest that the convictions (if the two instruments are to be read together) is not good. It purports to impose Thirty days' imprisonment, to be followed, in a certain event in which it could not lawfully be imposed, by Two months' additional imprisonment; and this latter branch of the sentence being in excess of the jurisdiction, as it is imposed, must nullify the whole sentence.

ANTONIO GOMEZ *v.* FRANCIS PHILLIP, SERGEANT POLICE FORCE.

6th April, 1867.

(Ordinance 14 of 1855.)

Removing Rum without a Permit.

THIS was an appeal from the decision of Mr. FRASER, S.J P., who had convicted the Appellant for removing Rum without a Permit. The Review could not be entertained, as the Plaintiff in Review was not a party to the proceeding in the Court below.

BEAUMONT, C.J., gave judgment as follows:—

I could not entertain this Review, it appearing on the face of the papers laid over, that the Plaintiff in Review was not a party to the proceedings in the Court below.

RICHARD JOSEPH KELLY *v.* WILLIAM FARLEY AND COLIN LIVERPOOL.

15th April, 1867.

(Ordinance 20 of 1856.)

Larceny—Value of property must be stated in order to bring case within Magistrate's jurisdiction.

THIS was an appeal from the decision of Mr. G. B. MC KENZIE ROSS, S. J. P. The facts appear in the judgment.

NORTON, J., gave judgment as follows:—

In this case, the Applicant for Review was convicted of "having "on the 31st of January, and 1st of February, 1867, stolen from the "Buildings of Plantation *Albion*, Sugar, the property of the "Colonial Company, Limited, part of which was produced in "Court (is) valued at four cents, contrary to Ordinance 20 of 1856." The conviction, the material part of which I have set out, is bad on the face of it, the stealing as charged, not being within the meaning of Article 3, Section 2, of that Ordinance, as "*petty theft*

"of *property not exceeding* in value the sum of Ten Dollars," and consequently not being punishable summarily at all. To warrant a summary proceeding under that Section, the value of the property stolen must be stated, and further, such value must not exceed the maximum fixed. If there be no such statement, the want of it cannot of course be supplied by any intendment or inference, still less can the defect be cured, or even helped by any statement, as to what the property *produced in Court* was valued at, as of course the value of the property found is, not necessarily, any criterion as to that of the property stolen. Now, here, there is no averment whatsoever, as to the value of the property in question, nor can I intend that it was of such an amount as to bring the case within the cognizance of the Magistrate; to do so would be to assume the existence of a fact, on which the summary jurisdiction depends, and to violate the great rule "that while *nothing* shall be "intended to *be out of* the jurisdiction of a Superior Court, but that "which specially appears to be so, nothing *shall be intended to be* "*within the jurisdiction of an Inferior Court*, but that which is "*expressly* alleged." Peacock *v.* Bell, 1 Saunder, Paley on convictions, 5th Edition, p. 183. According to this rule, the offence charged cannot be presumed to be within the cognizance of any Inferior Court, as the circumstance on which such Court's jurisdiction is founded, does not appear on the face of the proceedings, either by direct averment, or reasonable intendment.

The proceedings are scarcely less exceptionable than the formal instrument of record—improper (hear-say) evidence being admitted, and no proof whatsoever given of the property as laid, which may inconsistently with the evidence at least, have been in the accused himself. For these reasons, I am unable to uphold the judgment of the Magistrate, which is a mere nullity. The proceedings being for want of jurisdiction *Coram non judice.*

I therefore reverse the decision, and quash the conviction, and condemn the Defendant in Review, to pay to the Applicant for Review, the costs of these proceedings.

JACOB PEMBERTON *v.* JIMMY JAMES.

8th June, 1867.

(Ordinance 7 of 1866.)

Relating to Pounds, and Impounding Animals.

THIS was an appeal from the decision of Mr. FRASER, S.J.P. The case turned on the point, whether the Plaintiff in Review had not

impounded the cow, with the view of *making a stray*, according to the charge, or impounded it as being a stray. The Judge held the latter opinion, and reversed the sentence of the Magistrate.

BEAUMONT, C. J., gave judgment as follows :—

In this case, the charge against the Appellant is brought as under Section 7 of the Pound Ordinance, for taking with the view of making it a stray, the Complainant's cow on land of which the Defendant is not the owner or occupier. I may observe, that the charge, though in other respects substantially correct, erroneously enough charges the Defendant with taking the cow "on" instead of from the lands mentioned. Now, as the taking it "from" the land designated is the very gist, and I may say, point of the offence when done with the object defined, this defect would probably have sufficed to avoid the conviction. I stated, however, upon the case being opened, that I must reverse that conviction upon another ground, and I propose to take this course, rather than to treat the conviction as *ipso facto* void; and that the rather, as the objection above mentioned has not been taken by the Appellant.

But treating the charge and conviction as if the Defendant had been charged with taking a cow *from* the land in question, it is plain upon the evidence, that he did not do it *with the intent alleged*. The fact I take it to be this, that he has some land adjoining that mentioned in the charge; that the cow was straying on his land; that before he could seize it, it passed from his land on to that which was not his, but that he pursued it, and with the help of some boys, caught it and carried it off *to impound* it; but before he actually took it to the Pound, the Complainant redeemed it by paying two shillings.

I may observe in passing, that upon a charge of this nature, it is at least questionable whether that redemption should not be held a waiver of the Complainant's right of complaint. But, assuming that it was not so, that it was done as under compulsion, or that the offence is one so far of a criminal complexion, as not to be capable of being so purged or waived, there does not appear the smallest evidence of any intent on the part of the Defendant to make the cow a stray. It is plain that the object was to *impound* it. It may be presumed, I think, that he deemed himself entitled to follow it from his own land, where it had strayed, and seize it elsewhere for that purpose. In this, no doubt, he was in error, and he committed a trespass, and might be made answerable for it in due process of law, by action, or in some cases penalty. But even if there were any doubt as to the notion or belief with which he acted, he took the cow, *not with the view of making it a stray*, but to impound it as being a stray.

The two things are essentially distinct. The Ordinance does not make every illegal impounding an offence punishable on Summary

Conviction, but it does point out specific acts in relation to the subject which the Legislature has thought fit so to treat.

Very naturally and reasonably, certain acts done with the view of making animals strays intentionally are so treated, as acts in their nature, not only wrongful, but either malicious or fraudulent. It is with this offence that the Defendant is charged, and as I see no ground whatever for imputing it to him, I must of course set aside the conviction.

PETER GORDON *v.* MARGARET BURNS.

19th June, 1867.

(Ordinances 4 of 1864, and 2 of 1853.)

Refusal to work—Want of evidence as to indenture.

THIS was an appeal from a decision of Mr. G. B. MC KENZIE Ross, S. J. P. The facts appear in the learned Judge's remarks.

KING, J., gave judgment as follows:—

In this case, the Respondent charged the Applicant for Review, "an indentured labourer in my service, at Plantation *Susannah*, on "the East Sea and Corentyne Coast, Parish of Saint Patrick's, of "the County of Berbice, with having refused to perform his work "thereon, from Friday, the 8th day of May, 1867, to date," (viz., the 27th May, 1867, when the charge was made). On this charge he was convicted, and the conviction sets out, that Peter Gordon is convicted for that "he the said Peter Gordon, from the 8th to the "27th day of May, 1867, at Plantation *Susannah*, then and there "did unlawfully refused (sic) to perform his work on said Estate, "contrary to Ordinance No. 4 of 1864." Upon this sentence followed by Thirty days' imprisonment with hard labour.

The Ordinance 4 of 1864 is the "Consolidated Immigration "Ordinance," and its provisions apply solely to the indentured labourers mentioned in it, namely, indentured immigrants. There is nothing in the evidence to show that the Applicant for Review is an indentured immigrant labourer of either of the classes referred to in that Ordinance, and in the absence of evidence to that effect, the provisions of the Ordinance cannot be made applicable to him. It is evident that the charge was intended to be made under the Employer's and Servant's Ordinance. The term "indentured "labourer" having been used as equivalent to a labourer under contract, it being provided in the interpretation clause of the last named Ordinance, that "every contract shall mean an indenture." But even so, the charge would have been defective, and the

conviction erroneous. The Employer's and Servant's Ordinance, and the Immigration Ordinance, both made it an offence in a person under contract or indenture of service, to neglect or refuse to perform his work, "unless for some reasonable cause" or "without "reasonable cause." In the charge, therefore, as well as in the conviction, the refusal to work, which is the basis of the complaint, ought to have been alleged to have been without reasonable cause. It is true, that the Applicant for Review is stated in the conviction to have un*law*fully refused to perform his work; but upon the cases decided, it is not clear to me that the allegation is sufficient to cure the want of a distinct allegation, negativing the absence of reasonable excuse.

Be this as it may, the conviction is on the face of it bad. The sentence is one of imprisonment with hard labour for Thirty days. In the conviction, Applicant for Review is adjudged to be imprisoned and kept to hard labour for the space of Thirty days; and again, adjudged "to be imprisoned and kept to hard labour for the space "of Thirty days, to commence at, and from the termination of "imprisonment aforesaid." This, if it means anything, is an adjudication of two terms of imprisonment of Thirty days each, with hard labour, for an offence to which the law has awarded Thirty days' imprisonment with hard labour, as the utmost punishment. It is in excess of jurisdiction, and consequently bad.

Such being my opinion, it is unnecessary that I should make any remarks upon the merits of the case; but I cannot avoid observing that in the evidence, both the nature of the service contracted to be performed, and the breach of the contract are proved in so very vague and unsatisfactory a manner, as to lead to grave doubts, whether the conviction could be sustained, even if it was not formally defective.

I am of opinion that the Magistrate's decision must be reversed with costs.

PETER GORDON *v.* MARGARET BURNS.

19*th June*, 1867.

(Ordinances 4 of 1864, and 2 of 1853.)

Form of Conviction—Two Penalties in one Commitment.

THIS was an appeal from a decision of Mr. G. B. Mc KENZIE Ross, S. J. P. The facts are sufficiently indicated in the judgment.

KING, J., gave judgment as follows:—

In this case, a complaint was made by the Respondent against

Peter Gordon, the Applicant for Review—"Indentured labourer "for having on Friday, the 24th day of May, 1867, cruelly and "wilfully maltreat (sic) and abused a Calf belonging to me, "(Respondent) at Plantation *Susannah* on the East Sea and "Corentyne Coast, in the Parish of Saint Patrick, of the County "of Berbice; the said Calf being then and there under his charge."

Applicant for Review was convicted, and the conviction runs thus—"For that he the said Peter Gordon, on the 24th day of "May, 1867, at Plantation *Susannah*, then and there did cruelly "and wilfully *mal*treat (sic) and abuse a Calf, the property of one "Margaret Burns, contrary to Ordinance No. 4 of 1864." Upon this conviction Peter Gordon was adjudged for his said offence, to be imprisoned and kept to hard labour for the space of Thirty days, and also, in the same conviction, adjudged to be imprisoned and kept to hard labour for the space of Thirty days, to commence at, and from the termination of imprisonment aforesaid.

The remarks which I have made in a former case, in which the same parties are respectively Applicant for Review and Respondent, with reference to the absence of any evidence as to the Applicant for Review being an immigrant, and the consequent inapplicability of the Immigration Ordinance to his case attach here. But, it is also to be remarked, that, whereas in the complaint, reference is expressly made to the fact of the Applicant for Review being an indentured labourer, and to injury having been inflicted by him on a Calf under his charge, in the conviction no reference whatever is made to these very important circumstances. Whether the complaint was made and adjudicated under the Ordinance relating to Employers and Servants, the very gist of it was, that the act complained of was committed by the Applicant in Review in his capacity, either as an indentured immigrant, or as a servant under contract, as the case might have been; and yet there is nothing in the conviction to shew that it was in that capacity that he injured the Calf, and became liable to the punishment awarded.

With respect to this conviction too, as with respect to that to which I have already referred, there is this remarkable circumstance to be noted, that whereas the sentence is one of imprisonment with hard labour for the space of Thirty days, it carries on the face of it an adjudication of imprisonment with hard labour for two periods of Thirty days each, equal together to Sixty days, and thus in excess of jurisdiction.

In this case, it being a usual charge against the Applicant for Review, adjudicated on the same day, if the Magistrate intended, as it is to be presumed he did intend, that the imprisonment for the subsequent offence should commence at the expiration of the term to which the Defendant had been previously sentenced; it should have so appeared on the face of the conviction, and not only

on the conviction, but upon the commitment. Something does appear on the commitment, of which I have a copy before me to this purport—"This to take effect after the first sentence." But it appears as a foot note, and not as it ought to be, in the body of the commitment; which I think is most irregular and informal. On the whole, taking the sentence, conviction and commitment together, I am of opinion that they could only have the effect of a sentence of imprisonment concurrent with that adjudged in the first case. And I am also of opinion, that the proceedings were taken under an Ordinance that was not at all applicable to the case, and that they would be bad for that reason, even if they were not vitiated by the conviction.

Upon the merits of the case, if the proceedings had been taken under the Employer's and Servant's Ordinance, the evidence would have sustained a conviction; but, as it is, the Applicant for Review must escape well-merited punishment through the informality which pervades the proceedings from beginning to end. I am of opinion that the decision must be reversed with costs.

W. F. Mc LEAN, SERGEANT OF POLICE *v.* MANOEL JOAQUIN ROBEIRA AND ANTHONY GOMES D'ORNELLAS.

19*th June*, 1867.

(Ordinance 1 of 1837.)

Sunday trading—Form of conviction—Joint award of fine against two Defendants—Master not liable for acts of servant.

THIS was an appeal from a decision of Mr. D. BROADHEAD, S.J.P. The facts are sufficiently indicated in the judgment.

KING, J., gave judgment as follows:—

This is a complaint by W. F. Mc Lean, Sergeant of Police at Fort Wellington Police Station, against the Plaintiff in Review, and Anthony Gomes D'Ornellas, "for having on Sunday, the 14th day "of April, 1867, at Plantation *Hope* and *Experiment*, in the Parish "of Saint Michael, County of Berbice, and Colony of British "Guiana, committed a breach of the Sabbath Ordinance, No. 1 of "1837, by allowing their Retail Shop on said Plantation *Hope* and "*Experiment*, to be opened, and goods exposed therein for sale, "and did sell, to wit, Rum therein, between the hours of 12 and 1 "o'Clock." The Magistrate considering the offence proved, sentenced "the Defendants to pay a penalty of Five Pounds stg. (Seventy

"Guilders) with costs, $3 60; the same to be levied by distress in "default of payment, and in default of sufficient distress, Defendants "to be imprisoned for One month."

This conviction is in the wrong form, because the Ordinance under which the Defendants were convicted, makes no provision for the penalty being levied by distress.

It may be further remarked, that it has been held that the joint award of one fine against several Defendants is erroneous, whether the offence is in its nature single or joint.

The conviction, moreover, is bad, inasmuch as it imposes on the Defendants, in default of payment, a term of imprisonment, which the Magistrate had no power to inflict, by virtue of the Ordinance under which the sentence was awarded. The maximum term of imprisonment in case of non-payment of a penalty authorized by the Sabbath Ordinance is Six days, and to impose a month is an excess of jurisdiction, which vitiates the proceedings.

But upon the merits, it is doubtful whether there is sufficient evidence to sustain a conviction against the Plaintiff in Review; as against the other Defendant, who is not before the Court, there is absolutely no evidence.

The complaint is rather curiously stated. It is for having committed a breach of the Sabbath Ordinance "by allowing their "Retail Shop to be opened, and goods exposed therein for sale, and "did sell, to wit, Rum, therein, &c." It does not follow the words of the Ordinance exactly, which would have been the safer course; and it charges by way of offence what was only the evidence of it. What was proved against the Plaintiff in Review amounted to this—that on the day charged, the windows and doors of the shop were open—and that people went in and bought Rum and salt goods; that Coolies and others were in the shop drinking Rum, and that half a bottle of Rum was sold to the witness Gopie. Besides this, Plaintiff in Review states before the Magistrate, that "his shop is open for the purpose of supplying the people of the "Estate with provisions, because of their not getting paid until "late." It is not proved, however, that the Plaintiff in Review was in, or near the shop on the Sunday in question, or in any way cognizant of what was going on there—no one saw him on that day. The Rural Constable, Sharpe, swears "Defendant was not "there;" "I did not see him there that day." The Coolie to whom the Rum was sold, deposes, "it was not the Defendant I bought "the Rum from;" "I do not know Defendant." The Rum sold was served by a Portuguese, with whom, and with whose transactions there is nothing to connect the Plaintiff in Review, except that the former sold Rum in the shop of the latter. The relation between them of Master and Servant, is neither alleged nor established; so is left as mere matter of inference. If it had been othewise, would

it have helped the case, looking to the fact that in the Sabbath Ordinance there is no provision to be found rendering the keeper of the shop responsible for a breach of the Ordinance by any member of his family or any person employed in or about his shop? Is there reasonable evidence that the party accused either did the illegal acts charged, or that he caused them to be done by the instrumentality of his servants or agents, who may have authority for that purpose, either expressed or implied, actual or constructive? Upon these points there is in my mind much doubt; but it is not necessary to decide them, or to discuss the other grounds of Review, because, for the reasons which I stated at an earlier time, I find it impossible to uphold the conviction.

I reverse the Magistrate's decision, and quash the conviction with costs.

DABEL *v.* JOHN LEWIS STRAKER, COMMISSARY.

27th July, 1867.

(Ordinance 15 of 1861.)

Licence for sale of Malt Liquors, &c.

THIS was an appeal from the decision of Mr. BURY, S.J.P., who had convicted the Plaintiff in Review for selling Malt Liquors to be drunk on the premises, without having a licence for same. The Judge held that in the charge there was no offence, and the conviction was utterly bad, inasmuch as it did not convict the Plaintiff in Review of selling Malt Liquors *in less quantity than two gallons*, according to the Ordinance.

BEAUMONT, C.J., gave judgment as follows:—

The appeal in this case was presented to me on various grounds; but was rather pressed on the ground of there being insufficient evidence of the Appellant having infringed the law. I do not deal with the case on this ground:—

1st. Because it really does not arise in the view which I take of the case.

2nd. Because the question of the *balance of evidence* is not one proper as the ground for reversing a Magistrate's decision, except under some exceptional circumstances, and

3rd. Because I think it cannot be said that (if the charge and conviction had been duly framed to establish a breach of the law, by sale of Malt Liquor under two gallons to be drunk on the premises, without a licence so to do), this case would have wanted evidence to support such charge.

The other points urged, I do not think it necessary to notice; but I feel no doubt that the conviction cannot be supported, because it does not convict of any offence. The same consideration, no doubt, applies to the charge; but the substantial nature of the defect is more apparent and conclusive to those who are not versed in the law, by looking at the conviction. The Appellant is convicted for selling, or causing to be sold, &c., &c., &c., Malt Liquor to be drunk on the premises, "contrary to the provisions of Ordinance "No. 15, anno 1861, and Tax Ordinance of 1866;" and passing over other objections which were urged against it, I think this one is fatal; that it does not convict him of selling Malt Liquor in less quantity than two gallons. That is a material, if not, indeed, *the* material element on condition of the offence, which the Appellant is said to have committed; for it is no violation of either Ordinance to sell Malt Liquor without a licence, except sold in quantities less than two gallons. Such a defect cannot, I think, be supplemented by a reference to the Ordinance. To allow it to be so, would be to set aside the essential and reasonable requirement, that every conviction shall be certain and complete on the face of it; and on this ground I cannot do otherwise than reverse it.

SEEWOTOHUL *v.* JOHN MENZIES.

27th July, 1867.

(Ordinance 4 of 1864)

Immigration—Sufficient quantity of work—Evidence of previous misconduct.

THIS was an appeal from the decision of Mr. Cox., S.J.P., who had convicted the Plaintiff in Review, for not performing a sufficient quantity of work for the week ending 29th June, 1867. The sentence of the Magistrate was set aside on the informal nature of the charge and conviction, and that he had allowed evidence of previous misconduct to influence his judgment. The facts of the case will fully appear in the judgment.

BEAUMONT, C. J., gave judgment as follows:—

I have felt a good deal of anxiety in dealing with this case,

because of the importance of ascertaining, and applying a rule which shall be sound and accurate in point of law, and yet reasonably fair, and reasonably strict in relation to facts and conduct as between parties in the position of Indentured Immigrants on the one hand, and their employers on the other.

The Appellant's Counsel laid stress on the exceptional and stringent nature of the obligations of immigrants as being in restraint of the ordinary personal liberty of action, which is the first right of all British subjects; and beyond question, these obligations are so far exceptional, that if they were not construed and inferred fairly and justly in accordance with a known and equal law, the consequence must be very serious to them, and not less so in the long run to their employers. But on the other hand, the scheme upon which their status, rights and liabilities have been established and regulated, has been deliberately sanctioned by the law as a matter of policy; and their employers must be duly secured according to that law, which is intended to serve for the protection of both classes alike, in the benefit of the engagements and services for which they have contracted. So that although the law, and especially its penal provisions on this important subject may well demand a most careful study, and even a peculiar discretion, moderation and impartiality in its administration; it must after all be ascertained and applied upon just the same well-known principles of interpretation and judicial proceedings, as are applicable to other subjects.

At the same time the difficulties which must be encountered in defining with fairness and accuracy the reciprocal rights and obligations of persons in so exceptional a position, apparent as they are *a priori*, become more so upon a careful examination of the law, and endeavour to apply it to the emergencies of practice. And as there can be no doubt that in this case, and that similar one which I have to dispose of to-day,* the Magistrate has been anxious to do full justice according to law between the parties, it is very unwillingly that I have found myself, in a matter involving so many difficulties, not only compelled to reverse the decision of the Magistrate, but to do so without being able to point out a satisfactory solution of those difficulties, which indeed, a little consideration will serve to discover, but which much consideration can hardly resolve. One or two points, however, are so far clear as to guide me to a conclusion in these particular cases, and I trust that these will in some measure serve towards the avoidance and the solution of similar difficulties in other cases.

The Appellant has been convicted of "not performing a sufficient "quantity of work during the week ending 29th June, 1867;" and

* Vide *Itchchay* v. *Menzies*, p. 216.

has been sentenced to pay a fine of $12. Now, that conviction as it appears before me is in an informal, or irregular shape. I cannot avoid observing that it is unfortunate that such should be the case, and that it is really of great importance that the forms which the law requires in such matters should be attended to, even with the utmost exactitude.

There is another defect which I also think it desirable to notice in passing, although without resting my decision in the case upon it, which I do not do, since it may be doubtful whether it is expressly taken as a ground of appeal, or whether under the circumstances it is open to the Appellant. But there is really no proof that he is an indentured labourer. The strict proof in such a case would be the indenture itself; but the Legislature has expressly provided (Ordinance 4, 1864, Section 66) for the employer being furnished with a very simple mode of proof, in the "lists of immigrants," which are required to be given, and are made evidence for the purpose.

But, on looking to the charge itself, I cannot but think that it is fatally defective. On the face of it, it is so vague as to provoke enquiry at once; for there is not, nor do I see how justly there could be, a summary jurisdiction to punish a free man for not doing a "sufficient quantity of work." That phrase may be very well as a popular phrase, but in fact the Legislature has not only felt the difficulty of making provision in this matter, but has endeavoured to grapple with that difficulty; and while of course recognising throughout its provisions, that general obligation to labour which is the basis of the indenture of immigrants, it has been careful to define the particular breaches of that obligation which shall be penal. These cases are enumerated in Sections 115 and 116, or rather in Section 116, with the preceding Section taken in aid; and after carefully weighing the matter, I cannot but come to the conclusion, that in a case in which after all so much difficulty must be experienced, and allowance made in duly administering a law so exceptional, it is absolutely essential, and a most important and fundamental guide to its administration, that the precise definition of the law should be followed, and that in a penal charge of this nature the Complainant should state precisely under which of the enacted heads or classes of offences he lays his complaint.

I do not know that any case could more strongly illustrate the importance of this, than the present. For when we look at the facts, it is apparent that not only did the Appellant commence the work required of him as task work, but that the full measure of that work was in fact performed within the week in question—performed, that is, in a way, though the Complainant says it was *not well done*, and in this sense, *not finished*. That is plainly the contention. The Defendant, indeed, maintains that it was not only

done, but well done. But however that might be, it is plain that the dispute was about the quantity of the work, and how far in that sense it was finished, and moreover, that the Appellant in order to satisfy the Complainant, with his sanction, and indeed on his requirement, went over it in the following week, and then it is admitted he did finish it properly.

As I have already observed, the Appellant, on being charged in this case, contended and adduced evidence to shew that his full work was in fact done properly within the first week, but it would of course require a strong case to justify me in reversing a Magistrate's judgment on such point, assuming that he had acted on legitimate evidence in arriving at his conclusion, and therefore I pass over that question.

But if the complaint had been duly framed under Section 116 as a complaint of having neglected to finish the work required of him, the answer would have been that it had in fact been finished; and even if it could be held that in strictness the penalty attached when it was left unfinished on the Saturday, it would have been apparent that if afterward finished at the desire, and with the approval of the Manager, he could not maintain such a complaint.

Illustration, however, apart, I must hold, that there is no such penal offence known to the law as "not performing a sufficient quantity "of work;" and that a penal offence known to the law must be charged in terms substantially exact, in order to sustain a Summary Conviction of this nature.

There are two other points, which I think it desirable to notice, as of general importance.

One of them, on which indeed, I should have felt myself compelled to reverse this decision, supposing that the charge had been sufficient, is that the Magistrate admitted evidence of previous neglect of work on the part of the Appellant. He himself stated to the Court from the Bar, that this was only done to guide him as to the sentence, and after he had decided the main question. But that would not so appear in this case. In that of Itchay, indeed, it does seem that similar evidence was received at a later stage, but in this, it is found in the body of this evidence. Now, making every allowance for a certain laxity of practice in admitting matters not in evidence on the main question to influence a judicial sentence as to the measure of punishment, it is one not easily recognisable with the law, and assuredly should be most jealously guarded, if at all to be admitted in cases of Summary Conviction before Magistrates who have both to convict and to sentence.

But I can have no doubt that the admission of evidence in this case, of evidence of previous convictions for neglect of work, must be treated by me as fatal to the whole proceedings. It stands as

evidence in the case, and I cannot be asked to judge, or assume that it had not effect as such.

The other point is one that not only would appear to occur here, but unless I have overlooked some explanation of the difficulty, must, I fear, operate very seriously, if not fatally, to embarrass all cases of this nature, until the Legislature may, in its wisdom, be able to devise a remedy. The necessity of providing some fair, precise, and practicable test of the quantum of work to be performed by immigrants is apparent, and its difficulty not less so. The Legislature appears to have thought that this difficulty was solved by the provisions of Section 115. The provision made as to day work, is obscure and vague enough, but as to task work, I am quite unable to put a meaning upon it. The only definition of the amount of task work to be done within each week, is "five tasks of the "extent assigned for the same rate of wages as daily tasks, by the "Creole labourers of this Colony." But as no rate of wages is mentioned, I cannot myself discover any clue to the meaning of the Legislature in this provision, which must be read with, and expressly relates to the penal provision, enacted by Section 116. One of the witnesses in this case seems to take the wage of a "task" to be a guilder, but that is wholly gratuitous, and, as far as I see any provision in the law he might as well state it to be half-a-crown, or a crown; and indeed, it would seem scarcely probable that the Legislature can have intended to provide only one scale and rate of wages and work for every class of indentured labourers, from the weakly lad or woman, up to the mature and hardy man. But whatever may have been intended or contemplated by the Legislature, the law must be ascertained and administered by what they have said; and the Ordinance defines the task required by its provisions, as equivalent to the task assigned to the Creole labourers "for the same rate of wages"—a provision which has no meaning whatever, except by reference to some other definition of the rate of wages, which I have not discovered. It is not necessary for me, indeed, to dispose of this case upon that ground, for on those above-mentioned, I find myself compelled to reverse the decision of the Magistrate. But as I cannot but see that this point arises, and must recur in other cases, I cannot properly pass it over.

ITCHCHAY *v.* JOHN MENZIES.

27th July, 1867.

(Ordinance 4 of 1864.)

Immigration—Insufficient work—Reasonable excuse.

THIS was an appeal from the decision of Mr. COX, S.J.P., who had convicted the Plaintiff in Review, for not performing a sufficient quantity of work. The sentence of the Magistrate was reversed on the same grounds as in the case of Seewotohul *v.* John Menzies. *(See case.)*

BEAUMONT, C. J., gave judgment as follows:—

The reasons given by me in the case of Seewotohul,* govern this case also. There is, however, a further point to be noticed, and one of such importance, (though, probably, had it stood alone, I should have referred the case back to the Magistrate, instead of reversing his decision), that I think it right to refer to it so as to afford some guide to the Magistrates in future cases of the same kind.

The complaint here is laid in the same form as in the case against Seewotohul, but its substance is, not that the Complainant left her work badly, or incompletely done, as to its quality and finish when undertaken, but that she did not do any work at all, except a small, and as is said, wholly inadequate amount. Now, looking to the nature of the work it is said she ought to have done, it would rather seem she finished that in hand, and did not commence a further task, and that the complaint against her, if stated duly under an appropriate head of those made penal by Section 116, would have been that she neglected, or refused to begin the "work "required to be performed by her;" but even if it would fall properly under the next head, of neglecting, or refusing "to finish any work "required to be performed by her," it would be equally open to this remark, that I do not find any evidence of her having been required to perform the work, which the complaint charges her with not having done.

The point, however, which I desire more particularly to notice is, that she alleged a "reasonable excuse" for her imputed offence, viz., that her feet were so bad that she could not do more work than she did. It is true, that at first sight this seems an excuse easily made, and which might easily be overlooked; but it cannot

* Ante, p. 211.

lawfully be overlooked if it be a reasonable excuse, she is entitled to set it up, and if true it would no doubt be a reasonable excuse, and so a good defence as far as it extends. As to its truth, it is a matter which she may not be well able to prove for herself except by her own statement. But it is a matter which may nevertheless well be, for though (in the absence of malformation or apparent disease) pain in the feet may sound to hearty men an idle and frivolous, or imaginary complaint, beyond question it may not be so with weakly persons, and especially with women; and it would seem to deserve particular attention in this Colony from the known tendency of weakly persons to dropsy, and similar disorders.

Seeing, therefore, that this is a penal charge brought by the employer, and that the employer is bound to find medical advice for the immigrants, I think that such an excuse ought not to be overlooked except upon sufficient medical evidence to displace it, unless indeed there be other evidence to show conclusively actual capacity for, and performance of work. In this case there is no rule beyond this, that it is said that the Appellant was not in hospital and did not complain. The first of these facts is nothing to the purpose; the second, it is not easy to estimate the value of, as it is ruled, for it in no way appears that she had any opportunity or even reason to complain until brought into Court on this charge, while it is said she was clearly in the habit of doing very little work.

TITO D'OLIVEIRA *v.* N. J. DARRELL, COMMISSARY.

3rd August, 1867.

(Ordinances 15 of 1850, and 10 of 1851.)

Licences for selling Spirituous Liquors.—"Bottle" of Spirits—Informality of conviction.—Costs.

THIS was an appeal from the decision of Mr. BRUMELL, Police Magistrate, who had convicted the Plaintiff in Review for selling some Brandy, without having a licence to do so. The sentence of the Magistrate was reversed, as the conviction was informal, shewing neither jurisdiction, offence, procedure nor judgment.

BEAUMONT, C. J., gave judgment as follows:—

In this case, the Appellant must succeed. The charge upon which the proceedings have been founded is open to various

objections. It is a complaint of selling Brandy without a Retail Spirit Licence; yet it does not state the quantity sold, except by describing it as "a bottle."

Now, I would rather avoid considering, whether in a penal charge "a bottle" can be held to convey any definition of quantity, and therefore I do not decide the case on this ground, though, as I can hardly suppose that it could be supported by the use of the word "bottle," I take the opportunity of once more calling attention to the importance, the necessity, and the simplicity of the requirement that in such cases the complaint shall state the sale complained of as one which the law prohibits, *i. e.*, in or over, or less than such and such a quantity, as the case may be or require.

But again, the charge alleges the sale to have ben contrary *to Ordinance* 10 *of* 1851. Now, I have before had occasion, in a case of appeal upon similar grounds (the case of Cahuac *v.* Birch*) to point out that if the particular provisions which were by that Ordinance created in so curious, but so express a mode, as part of Ordinance 15 of 1850, are *expressly referred to* in a penal charge, they must be referred to *accurately*, at the risk of the charge being found defective.

It is true that the defect in that case was more precise and apparent than it is here, and I felt so far a difficulty as to the mode in which these Sections should be referred to, that I avoided the expression of my opinion upon this express point. But many of my observations in that case apply no less to this. I must now however say, that it appears to me that the only safe course is either *not to refer at all* to the precise law by its particular enactments and Sections (for if the offence be precisely stated and charged as *unlawful*, it is not necessary to make such reference) or to refer to the enactment under its original headings as *Ordinance* 15 *of* 1850, adding perhaps (for greater security and from abundant caution) such words as the following—"And Ordinance 10 of 1851," or "amended by," or "as enacted by" that Ordinance.

Nor is this by any means a matter of mere verbal accuracy. Indeed this case shows pointedly its practical importance. For in consequence of the true source and collocation of the enactment having been lost sight of in the charge, the Magistrate has fallen into error in the conviction, so as to call it a sentence imposed by him. He thereby directs the penalty imposed to be levied by distress, and in default, he orders the imprisonment of the Appellant unless he shall pay the penalty imposed and a fixed sum by way of costs and also the *cost of distress and of conveying the prisoner to gaol.* But such a sentence cannot be imposed in this case, which on turning to the law is found to be really one of an offence against

* Ante, p. 98.

the provisions of *Ordinance* 15 *of* 1850. For that Ordinance makes no provision for distress or for imprisonment, to enforce payment of costs of distress or conveyance to prison. Such a sentence is indeed authorised by the provisions of Ordinance 19 of 1856; (Sections 33 et seq.) but as Ordinance 15 of 1850 contains (Section 45) its own express provisions for the recovery of penalties for offences under it; those cases do not fall within the Ordinance of 1856, as they would otherwise have done. This error in the conviction, not only illustrates the importance of the defect noticed in the charge, but would of course of itself oblige me to set it aside. But independently of that, the conviction could not stand. It is not only informal, but is wanting in the material elements of such an instrument; shewing neither jurisdiction, offence, procedure, nor judgment, and bringing for it a mere unsigned memorandum from the minute book of the Magistrate.

I have in another case this day, (that of Williams *v.* Lynch) had occasion to point out that in order to sustain a Magistrate's conviction upon appeal, it should appear in a form valid of itself, and substantially answering all the requirements of the law as to such an act; and that when this does not appear, an invalid instrument which assumes the offence or virtue of a conviction, must be quashed. On these several grounds, therefore, I reverse, and set aside the proceedings in this case with costs.

JOHN WILLIAMS *v.* JOSEPH LYNCH, CORPORAL OF POLICE.

3rd August, 1867.

(Ordinance 14 of 1855.)

Rum—Unlawful possession of—Precision of charge—Conviction—Evidence taken before one Magistrate not admissible before another.

THIS was an appeal from the decision of Mr. FRASER, S.J.P., who had convicted the Plaintiff in Review, for having in his possession two hogsheads containing Rum. The sentence was quashed on the irregular, totally unaccountable, and inadmissible judicial proceedings before the Magistrate. The facts of the case fully appear in the judgment.

BEAUMONT, C. J., gave judgment as follows:—

There were numerous defects in this case urged as reasons for the appeal; the first ground was, that there was in fact no charge,

for that the charge was void from want of precision. Now, I am very anxious to avoid opening up any question as to Section 32 of the Ordinance (No. 14 of 1855) referred to in the charge, because, I should, I fear, find it hard indeed to put a satisfactory or clear construction upon that Section, or to lay down any definite rules as to the essential requirements of penal charges brought under it. It is enough that I should observe, therefore, that the greatest care should be taken in any charge brought under its provisions to meet and express anything which they really require. But it is not necessary in this instance to investigate that Section more closely, because the charge here is so vague and uncertain, that it by no means appears to be brought under it at all, for it is merely that the Appellant "unlawfully had in his possession two hogsheads "containing Rum, contrary to the provisions of Ordinance No. 14, "1855."

Now, in passing, I may observe, that it is at least awkward and unnatural, and it may be found dangerous, if not fatal in a complaint for unlawful possession of Rum, to charge the subject as "hogsheads "containing Rum." Strictly that is a charge of unlawfully possessing *hogsheads;* and making every fair allowance for verbal errors, that kind of laxity is exceedingly dangerous and undesirable. But under the Ordinance in question, there are a number of various cases in which the possession of Rum may be unlawful besides those falling under the provisions of Section 32. True, it may be, that it is not possession *per se* that is unlawful, but possession under given circumstances, and, it may be, as a result, or in some cases, an incident of facts expressly prohibited. But still, possession so arising may be unlawful, independently of Section 32, which seems to be that relied on to support this charge; and although that Section is the one which puts forward possession as "an offence," *that is not possession simply and per se,* but possession under given circumstances there described, but which are not specified either affirmatively or negatively by this charge. I think, therefore, that it is impossible to say that this charge contains sufficient certainty as to the nature or substance of the offence imputed by it. But again, there is plainly no conviction by reason of its defect in a most material particular, viz., the signature of the Magistrate, which does not appear. I have considered, whether on this ground I ought not rather to treat the case as not duly brought before me; but on the whole, I conclude that I ought not to do so.

That a conviction there has been, does appear in a sense, *i.e.,* an act arising from the Magistrate's proceedings, carried to a point in which he has assumed to condemn the Appellant, and has practically, and as if by form of law, brought him in peril; and in such a case I think that the provision for Review must be taken to apply, and the proceedings to be the subject of reversal, however

defective in themselves, and even although in truth and very law they may be nugatory. Nor is it possible that I should in this Court take any course to have such a defect rectified, supposing that it could be rectified at this stage. I must deal with the proceedings as they come before me, and as they come before me, this conviction is materially defective, and must be quashed.

There was, however, one other point urged before me of such a strange character, and so fatal to the whole proceedings, that I should not be justified in passing it over. It was said, indeed, that the conviction was against the evidence, and in truth, I find no evidence, which to my mind would support it, or go further than to bring the Appellant into a light of suspicion. The nature of the possession proved against the Defendant was this, that he was on board a sloop which had just run into Mahaica Creek, and which had Rum on board. His statement was, that he had come down in her as a passenger; nor was there anything substantial to shew on his part any connection with, or control over the sloop. One witness, indeed, said that when boarded the Appellant was shoving the boat off into deep water; but as this it quite inconsistent with the other witnesses' statement, and as one, if not two persons had actually got away from the boat and hidden upon finding it watched; it would seem a strange thing to say that there was any evidence on which to convict the prisoner of the possession of the boat and her load. But the case by no means stops here; and indeed, I rather conclude that the Magistrate himself thought there was not evidence to convict, for he did not convict on that evidence; but having called on the Appellant for his defence, he then sent him down to the County of Essequebo in order that an enquiry should there be made as to certain statements which he made with regard to himself; and subsequently, after certain so-called evidence taken before another Magistrate upon this enquiry being forwarded to him, he convicted the prisoner.

Now, every part of this proceeding was not only wholly irregular, but totally unaccountable, and in the result the so-called evidence and the judicial proceedings upon it wholly inadmissable.

It is indeed, a delicate and doubtful thing for a Magistrate to take any active course to strengthen the case of either party appearing before him. To be active in investigating crime, putting it in a train of inquiry, and in every way facilitating that inquiry is, of course, a Magistrate's duty; but when he comes to sit as an actual Judge in summary proceedings taken before him, it must be a very exceptional case indeed, that can justify a Magistrate in doing more than allow each party the fullest opportunity consistent with a fair and regular administration of the law to complete his case; otherwise the Magistrate becomes a party to the case, and greatly prejudices his just authority, and influence in finally deciding

it. But if this be so in general, it is so peculiarly in cases of this class, for this is a *Fiscal* case; and not only (as has been often said) is there "in equity" in Fiscal cases, the meaning of which is, that breaches of the Fiscal laws are more *mala prohibita*, and not to be classed with things *mala en se*, but they form a *class of cases*, and a class of cases expressly committed to the care of Executive officers of the Government, and in which, therefore, it is peculiarly undesirable that a Magistrate should descend from his position as a Judge, into an arena of contest so precisely marked out, and so constantly open before him.

But supposing that the proceedings adverted to were never so unobjectionable in this respect, suppose the Complainant had himself made direct application for them to be taken instead of their being taken by the Magistrate, as would appear of his own motion, they were not only wholly irregular, but illegal. The Magistrate had no power whatever to delegate any part of the inquiry before him to another; nor had he any power whatever to send the Appellant as he did to Essequebo for the purpose of such enquiry; nor had the Magistrate there any power to conduct such enquiry.

But again, even if the so-called evidence had been given before the Magistrate, it would have been inadmissable at that stage. The prosecution had been closed, the defence made; and no further evidence could be given, because no evidence had been given for the Defendant, and if the Magistrate was not prepared to convict in that state of the case, (as I presume he was not, and as I assuredly should not have been) the case had failed altogether, and the Defendant should have been acquitted.

But yet again, even if the Appellant had adduced evidence in his own defence, so as to let in further evidence for the prosecution, such could only have been evidence in reply or "rebuttal;" and such evidence is not admitted as to collateral circumstances, but only as to those material to the case. Now, the matters to which this irregular inquiry went were collateral matters, not matters shewing that Defendant was in fact in charge of the boat or Rum; but that as to some other statement made by him in his defence as to himself, not material to the real question, he had told untruths. Even so, it did not, as I read it, come to much; but it was at all events on these grounds entirely inadmissible. Nevertheless, it was not only admitted, but upon its admission the Magistrate found the Appellant guilty, which it appears he was not prepared to do upon the legitimate material theretofore before him. On all these grounds therefore, I reverse the Magistrate's decision in this case, and quash the conviction with costs.

BLANK *v.* THOMAS MULLIGAN.

10th October, 1867.

(Ordinance 7 of 1866.)

That illegal impounding is punishable summarily—Authority to impound.

THIS was an appeal from the decision of Mr. PLUMMER, S.J.P., who had convicted the Plaintiff in Review for impounding a horse. The sentence of the Magistrate was reversed, on the grounds that the charge was defective in substance as well as form. It does not state any offence even inaccurately.

BEAUMONT, C. J., gave judgment as follows :—

The point mooted in this case is one which has been repeatedly before me, viz., that though the illegal impounding of an animal may be, and often is an injury for which according to the circumstances of the case, the party injured may obtain a civil remedy, it is not a penal offence.

The only offence capable of being so described (and of course such description is a very informal and inaccurate one) is that constituted by Section 7 of the Ordinance relating to pounds, (No. 7 of 1866) in the cases of persons driving an animal from the premises of its owner, or taking an animal from the premises of its owner, or taking an animal from premises of which the taker is not the owner or occupier, "with the view of making an animal "a stray."

It is true, that this Section is by no means so clearly expressed as the similar one contained in the Ordinance of 1847. Still I think that its terms bear the same construction. Indeed, that is the only reasonable construction to be put upon such a law, even if less clearly expressed. For while to do any of the acts mentioned with the view of making an animal a stray, is in its nature a wrong, wanton or fraudulent, as the case may be, and so suitable for penal consequences, no reason can be suggested for treating a *bonâ fide* act, such as that of the Appellant, as punishable by way of fine upon Summary Conviction, any more than any other civil trespass.

But as this case has been disposed of on the ground that the acts of an Overseer sending a horse straying in the Estate's buildings to the pound, on the verbal order of the Manager, is unauthorised and so not only illegal, but penal.

I take the opportunity of pointing out, that if such a construction

of the Ordinance were admissible, it would put an end to the important uses of the pound, and would place all persons owning or possessing land at the mercy of those who might leave or encourage their animals to stray, for no man's servant could even drive off a hog, a goat, a horse, or an ox, from his master's provision ground or pasture, or cane piece; nay, not even from his garden or stable, or house itself, without subjecting himself to a penalty of Twenty-four Dollars, unless he had an authority in writing from the owner or occupier so to do.

And as "the owner or occupier" might be, and often is absent, (and that not only at the moment and from the precise spot, but often permanently absent or out of the district, or the Colony) it is manifest that the law would be entirely nugatory if Section 9 could be construed so as to apply to a servant or other agent acting *bonâ fide* on behalf of an owner or occupier in removing strays. It is not easy to see why in this case the Appellant should have been proceeded against.

Mr. Lorimer, the Manager of *Wales*, told him to impound the animal in question found straying in the buildings yard of that Estate. He being an Overseer on that Estate, thereupon told one Hinds to take it to the pound. Hinds then took it to the pound, and handed it over to Smith, the pound keeper.

Now, no doubt, if this were a trespass, every one of these is liable *civilly* for taking part in it, and would be answerable in damages, according to the requirements and justice of the case. But criminally or penally, only those who have the guilty *mens* are amenable to punishment.

Now, in this *calend* of persons, the Manager (who is no more the owner or occupier, than is the Appellant) was not only the principal, but the only person who seems to have had any independent view or object in the matter. But as it is plain, that even he did not act with the view of making any animal a stray, it is needless to enquire into the relative responsiblity of the parties for that which is no penal offence in any of them.

The charge, therefore is defective in substance, as well as in form. It does not state any offence even inaccurately—it does not accurately conform to the law in what it does state; and there is no evidence of any offence, even if the defect of the charge could be overlooked. These objections are apparent on the proceedings, and though not taken in appropriate terms, fall within the 4th ground of appeal, and consequently the conviction must be quashed and the Respondent must pay the costs of the Appellant.

JOHN BREMNER *v.* T. G. WIGHT, REVENUE OFFICER.

4th October, 1867.

(Ordinance 14 of 1861.)

Crown Lands—Onus Probandi of acquirement of Timber.

THIS was an appeal from the decision of Mr. Cox, S. J. P., who had dismissed a claim made by the Applicant in Review, for some timber and a punt, which had been seized by the Respondent in Review; the former for having been cut on ungranted Crown Lands in the Demerara River, and the latter having been used in transporting the same. The Magistrate condemned the timber and the punt to be sold. The Judge in reversing the Magistrate's sentence, referred to a previous decision of his in a similar case, viz., De Souza *v.* T. G. Wight.

BEAUMONT, C. J., gave judgment as follows :—

This is a case of a claim to timber and a punt, seized and advertised to be sold. It is almost identical in many of its circumstances with the case of De Souza *v.* Wight, which I disposed of a short time ago, and my judgment in that case has no less application to this, save in the two particulars I am about to mention; and thus advert to particularly, because there are various considerations of law which were then dwelt on, and which I desire to be understood as governing my judgment in dealing with this case, although upon the facts, I deal with it differently.

In that case, I did not find enough to entitle me to disturb the Magistrate's judgment upon the evidence, but here, I think the case for the Claimant is in effect undisputed, and the evidence on his part is so ample, that there being nothing whatever to the contrary, I am unable to discover any ground on which to base a conclusion adverse to him, and therefore it is my duty to allow the claim and reverse the order dismissing it.

Indeed, as to a part of the timber, and that a considerable part, it was admitted before me on the part of the Respondent, that the claim was good; and as the same admission appears from the papers to have been made to the Court below, and to have been recognised by the Magistrate, who confined his attention to the position of the timber, said to be "in dispute," which is treated throughout as well known. It is with surprise that I find this order dismissing the claim generally.

But even as to the timber "in dispute," I find no real ground for dispute in the evidence. It is true that the evidence is not so

particular as one would desire to see it. But I doubt whether it is not as specific as the nature of the case may allow.

At all events, it raises a strong *primâ facie* case, and one which was not shaken by cross-examination. The direct evidence, however, is strengthened by indirect evidence, viz., of a statement of the Respondent which strongly supports, even if it be not an express admission of the Plaintiff's case, which is that the timber in dispute was purchased from some Indians; and as I have no doubt that in cases of this nature, the possession, though disturbed by seizure, continues to afford a most important presumption in the way of evidence. His case as a whole appears to me amply supported. The Magistrate, indeed, appears to have concluded otherwise on the ground that the assistant Revenue Officer, and some Indians, were not called as witnesses.

Now, (passing over the consideration that a party is rarely to be expected to call witnesses, who from the fact of their position or engagements, may be supposed to be in an adverse interest, and that accordingly Alleyn's non-appearance is perfectly material, and affords no presumption to the prejudice of the case which is presented) it is altogether an assumption, as far as the papers before me shew, that any of these persons were important, or even proper witnesses. I gather, indeed, that as to Mr. Alleyn, the Magistrate's presumption was drawn from knowledge of his own, that he had been concerned in a prior seizure, which is mentioned of the Indians' timber. But that prior seizure really had nothing whatever to do with the case, being merely the history of the timber, prior to the purchase by Bremner, and, therefore, this ground amounts to requiring a Claimant to search out all persons who may be supposed to know anything about the timber. Now, there is nothing in which such a requirement can be based, and it is only an additional circumstance against it, that in this case, the matter presumed would appear to be, if not wholly irrevelant, at least quite too remote from the Claimant's case.

The Claimant had to make out a good *primâ facie* case; he appears to me to have made out a case as good as that which any ordinary person could be expected to shew to the timber in question, or any article of a similar nature; and so far from thinking that he should have hunted up either Indians or others to trace its history, I think that he would have been wrong to do so unnecessarily, and that to require him to do so further than may be necessary to make out his case, would be not only a great hardship, but a great wrong. It is hard enough to have to be called upon under such circumstances to make out a title at all; but it appears to me almost shocking, to think that a person in quiet possession of timber should be called upon at the mere act of another, to hunt up every one through whose hands it may be supposed to have

passed, and fetched him down to Georgetown, on the chance that he may be found able to say something about the timber. Trade could not be carried on upon such terms, and the law on this subject, severe as it is, gives no sanction to them.

I must observe, that I feel the less hesitation in reversing the Magistrate's decision in this case, because he really appears to have acted upon an entirely artificial application of this supposed requirement. For while as to part of the timber, the Claimant's case is undisputed, even as to that "in dispute," the Magistrate appears to have been himself satisfied that it really was purchased from Indians as alleged; for I find in the papers sent in by him, that in dealing with the case he expressed himself thus—"Having "dismissed this claim, I now feel it incumbent on me to censure "the Claimant in this matter for purchasing from the Indians, "timber, which he says had been previously seized, for the Claimant "must recollect that timber * * * * * I restored to the "Indians * * * * cautioning the Claimant at the time, not "to mix himself up again in the matter, but to allow the Indians "to have their timber, and dispose of it as they might think fit."

I do not understand on what ground these remarks were made, or how Indians can sell timber unless people buy; or why, if the Indians were authorised to dispose of the timber alluded to as they should deem fit, they should not sell it to Mr. Bremner; or why Mr. Bremner should in any respect be put under a disability not extending to other persons. But however that may be, these observations appear clearly to shew that the Magistrate really came in his own mind to the same conclusion as I do, viz., that the timber in dispute was purchased by Mr. Bremner from Indians, and that in acting counter to that conclusion, he acted under the supposition of their being some artificial rule requiring the production of Mr. Alleyn and the Indians.

The case standing thus, it is certainly not one in which I should have been disposed to listen favourably to the application which was made to me by the Respondent's Counsel, that the matter should be remitted for further evidence. The Appellant very naturally, I think, objected to that, and I cannot accede to it. Had the entire absence of evidence for the Respondent arisen from the mere act of the Magistrate, there might have been more ground to argue it. But even in a case much more favourable to such an application than this appears on the facts, it would have been a strong one to make, where the Applicant (the Respondent) had himself asked the judgment of the Magistrate upon the Appellant's own case, and submitted that he was not called on to answer it. That was what was done by the Respondent's attorney before the Magistrate, and I consider that under such circumstances, it would be an improper abuse of my discretion, and a great hardship, and

indeed, (looking to the nature of the case) a gross injustice for me to remit the parties to new litigation about the timber in dispute.

I feel no doubt, therefore, that the Appellant has made out his case.

MANOEL FRANCIS DE GOVIA *v.* J. T. GREENSLADE, COMMISSARY.

26th October, 1867.

(Ordinance 18 of 1850.)

Bread and Flour.

Where a particular class of persons are subject to a particular penalty, it must appear on conviction that Defendant belongs to such class.

THIS was an appeal from the decision of Mr. Humphreys, S.J.P., who had convicted the Appellant in Review of having in his bakeshop, sour and impure flour for the purpose of adulterating the bread. Section 6 of this Ordinance only applies "to bakers, and other persons making bread for sale—and journeymen or the servants of any such bakers or other persons." The sentence of the Magistrate was reversed.

BEAUMONT, C. J., gave judgment as follows :—

In this case, various points were raised against the conviction as it appears on the record of proceedings in the Court below, and in addition, or perhaps we should rather say, as a preliminary point, the Appellant impugned the correctness of that record as returned to this Court, in a particular which beyond question, would be of essential importance. Alleging that in fact he was not summoned to appear upon the charge set forth in the record, but upon one materially different.

There is, however, on the face of the proceedings, an apparent and fatal defect, which relieves us from the necessity of dealing with any of the points so taken.

The matter, of which it appears that the Appellant has been convicted, if it be treated as an offence at all, can only be treated as a breach of the provisions of Section 6, of Ordinance No. 18 of 1850, the enactments of which apply only to "*bakers* or other

"persons who shall make bread for sale, and journeymen or the "servants of any such baker, or other person." It is indispensable that it should appear in a charge and conviction under this provision, that the person so charged and convicted is one of the classes of persons to whom this Section applies.

But this does not in fact appear, and consequently the proceedings are defective, and the conviction must be quashed.

MANOEL FRANCIS DE GOVIA *v.* J. T. GREENSLADE, COMMISSARY.

28th October, 1867.

(Ordinance 18 of 1850.)

Regulating the making of, and sale of Bread and Flour.

THIS was an appeal from the decision of Mr. ALVES, S. J. P., who had convicted the Appellant in Review, of having in his shop unwholesome and adulterated meal. This case turned on the same point as in a similar case of M. F. De Govia *v.* Greenslade,* tried before Mr. Humphreys, S. J. P.

BEAUMONT, C. J., gave judgment as follows:—

In this case, I quash the conviction for the same reason assigned by me in quashing the conviction in the other case of appeal, decided this day between the parties. The offence here is charged under Section 10, of Ordinance 18 of 1850, a clause which applied only to *bakers*.

It is clear, therefore, that no charge or conviction under it can be good, unless it shews that the person charged or convicted is a *baker*.

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* See ante, p. 228.

MANOEL FERNANDEZ *v.* J T. GREENSLADE, COMMISSARY.

9th November, 1867.

(Ordinance 6 of 1867.)

Regulating the sale of Spirituous Liquors—"Business Premises"—Evidence.

THIS was an appeal from the decision of Mr. HUMPHREYS, S. J. P. It appeared that the Respondent in Review had found brandy and gin in the Appellant in Review's business premises, not having a Retail Spirit Licence for the same, for which the Magistrate had fined him Fifty Dollars and cost. The Judge held that the words business premises were a difficult thing to determine, and that the Magistrate had allowed inadmissible evidence, which was fatal. The sentence was therefore set aside.

BEAUMONT, C. J., gave judgment as follows :—

In this case, it is said that the Magistrate has convicted the Appellant without any evidence proper to sustain the charge.

This was mainly argued with reference to the fact, that, the spirits in question were found in a room, not shewn to be used for actual business purposes; but which would seem to be a bed-room, and therefore it is said, not "business premises." Now, I must say, that I feel great difficulty in dealing with this question, because I feel great difficulty in putting a construction upon the Ordinance regulating it, (Ordinance 6 of 1867) which shall serve what might appear to be its intention, without going far beyond its terms, and imposing very severe restrictions and penalties upon acts, not only most innocent in themselves, but such as it cannnt be supposed were intended to be prohibited. For "business premises," is a phrase so vague, that it must be interpreted according to the subject matter and allocation. It may include every part of the most extensive buildings, enclosures, wharves, &c., &c., which either by user, occupation, structure or enclosure are subservient to, or merely connected with, a shop, an office, or other place of actual business. It may mean, on the other hand, the very shop, office, or place of actual business, forming a part, and often an insignificant part as regards position or structure of such premises. Its meaning again may be ascertainable by extension, application, and restriction variable according to the circumstances of each case, but conforming to some general principle or intent to be ascertained from the Ordinance.

The Complainant in this case, of course, contends for the first and largest meaning of the words "business premises." The Defendant contends for the second and narrowest meaning of the term. The Magistrate, I apprehend, may have acted either upon the Complainant's view of the law, or upon the third alternative, reading the Ordinance as if it had contained the words "for the purpose of sale," inferring that these spirits were kept where they were for the purpose of sale, and that therefore the place where they were kept, though a bed-room, apparently came within the meaning of "business premises."

Now, as I have already intimated, the first alternative would seem to me too wide, and indeed, I may say extravagant to be even assumed as the intention of the Legislature, since it would operate to impose a law much more strict than any "Maine Liquor Law," upon a very large proportion of the population, and to prevent any person employed in or about a place of business, whether a store in Water-street, a shop in the Rural Districts, or for all that I can tell, the buildings of a Sugar Estate, from ever having any spirituous liquor in even the smallest quantity, save by the favor of the Revenue Officer, and subject to his visitation and prosecution.

The second construction would seem to tend to frustrate the apparent object of the Ordinance, and consequently would hardly be adopted if any other legitimate construction might seem open.

The third alternative seems to partake of the objections to both the others; and it is not easy to see how it can be consistently adopted in principle, or defined in practice.

Of course, in arriving at any construction, it must be remembered that a penal law especially cannot be strained beyond its plain terms and meaning, and when this meaning is doubtful, it must be construed more narrowly rather than more widely. But, on the whole, I find so much difficulty in arriving at a final opinion upon this perplexing question, that I prefer to rest my decision in this case upon other grounds which it affords, although, I have not thought it right to pass over the question of construction, which must no doubt, recur without pointing out for future guidance, those considerations that seem to mark out the line of controversy and of ultimate decision, and thus far to express a qualified opinion on the result of those considerations. But this case affords two independent grounds upon which the proceedings and conviction may be impugned. The first of these also I shall not actually decide upon, contenting myself with observing that the charge and conviction ought unquestionably to have charged and found that the Appellant was "the occupier" of the business premises upon which the gin and brandy in question were found; and that I

greatly doubt whether the defect of the proceedings in this respect could be deemed a mere defect in form.

But the second of these points is clear against the conviction, viz., that assuming everything else in its favor, it is not supported by evidence. I would, indeed, have had considerable doubt upon this question had the Magistrate's conclusion depended merely on the facts as to the gin and brandy in question being found in the Appellant's bed-room. For those circumstances, no doubt, might raise suspicion; and though, perhaps, not sufficient in my own judgment, to prove an intent to sell, I could hardly have interfered with the judgment of the Magistrate upon that point. But then, it appears that the Magistrate did not act solely upon this evidence, but admitted a statement which, beyond question, is inadmissible, viz., that the Complainant had heard that the Defendant sold spirits.

Now, the law on this subject is exceedingly plain and consistent with common sense and justice, that a conviction proceeding upon evidence which was inadmissible, cannot stand. It is true, that parties will sometimes blurt out statements that are inadmissible, and the fact of their being so blurted out, if not actually received by the Court, cannot prejudice the prosecution; though when this occurs something ought regularly to be done, or said to intimate that it is repudiated. But when, on the other hand, (as here) such inadmissible statements are embodied in a formal signed deposition, it is impossible to argue that they were merely blurted out as I have said, and not admitted. It is true also, that when such inadmissible statements are palpably and wholly immaterial to the case, they will not serve to prejudice the proceedings. But it is equally well settled according to the dictates of common sense and justice, that if they have any appreciable connection with it by way (as I may say) of *pseudo evidence* or prejudice, the conviction cannot be sustained by enquiring whether without them there might have been evidence enough for a conviction, for it is impossible to say, and therefore idle to inquire, to what extent the improper evidence swayed the decision of the case. I know of no rule more important to maintain, intact, than this, and it is not long since all the Judges refused to proceed to judgment on a conviction before the Supreme Court, on the grounds that the learned Judge who presided at the trial, had improperly admitted evidence manifestly of very slight importance, and indeed in the opinion of the learned Judge himself, of none, but yet having some connection with the case, and that was put forward at the trial as material.

Now, in the deposition of the Complainant in this case, I find this statement, "on two occasions I had information that the "Defendant was in the habit of selling spirits." I do not wish to decide whether evidence to the effect of this statement would have been admissible or not. It appears to me to be a question of some

nicety, involving again the true construction of this Ordinance; and I will only say that if the intent to sell be material to the charge, probably such evidence would be admissible; but otherwise probably not.

But, at all events, *this* evidence was not admissible, because it is mere hear-say. I have already pointed out that finding it upon the depositions, I must treat it as admitted in evidence, nor can I treat it as merely introductory, or explanatory of the proceedings of the Complainant.

There is a very wholesome, convenient and well-established form by which such explanations are given, viz., "from information I "received;" a phrase perfectly neutral, and yet as explanatory as justice and law admits, though not always as much so as curiosity desires.

Treating this hear-say statement then as admitted, it is impossible to sustain the conviction; whether it did or did not conduce to it in fact I cannot enquire. It ought not to have done so, because it was not evidence; but having been admitted as such, and its defect so far overlooked, it is plain that it was calculated greatly to strengthen the effect of the other evidence.

JAMES RODNEY, SENIOR, *v.* JAMES RODNEY, JUNIOR.

2th November, 1867.

(Ordinances 33 of 1850, and 19 of 1856.)

Trespass to be penal must be wilful—What is "wilful trespass"—Practice—Distress warrant.

THIS was an appeal from the decision of Mr. J. D. FRASER, S. J. P., who convicted the Appellant (Defendant in the Court below) of trespass on a lot of land at Friendship, to which both Appellant and Respondent laid claim.

BEAUMONT, C. J., gave judgment as follows :—

This is one of a class of cases with which I have more than once had to deal, and which I regret to have again before me, viz., cases in which possessory acts quietly done in the assertion of a right to land have been dealt with by Summary Conviction, as amounting to the penal offence of "wilful trespass."

Now, the law in this matter is so very clear in principle, and so important to be clearly understood and duly applied in practice, that I feel called on to propound it fully, as it applies to this case, and so as to point out its essential and natural character and features, for I am convinced, that this particular mistake of the law could scarcely recur, but from some bias against, or confusion as to its principles.

We start, then, with this simple proposition, that what a man has is his own, and that he is entitled to possess it; a proposition which should seem so plain in common sense and justice, as to be a truism. True it is also, that if one's property be in the quiet possession of another; I say quiet without reference to its lawful or unlawful character—we cannot lawfully take it by violence, but must appeal to the law; and if he should act otherwise, he will be guilty of assault or other trespass *vi et armis*. So says the law in protection of order; but this is no qualification of the right of property by which an owner may possess himself of that which is his own, beyond its specific import and limits as a safeguard against violence; and it leaves to every person the full right to hold, possess, and enjoy his own property, and as a particular instance of this to enter on his own land. If, indeed, another is entitled to possess it, so far it is not his own; but if another possesses it without right, that does not derogate from his own rights, save in so far as public order requires that it should do so; and the law accordingly allows him to enter upon it provided he can do so quietly. If he cannot, he must either give up his right, or resort to process of law to enforce it.

The law of this Colony makes penal what it calls "wilful trespass" on lands, and under that law the Magistrate has acted in this case. Now, so far as I know, that is a law peculiar to this Colony. According to general principles, as I take it, and according to the law of England and of this Colony, one may proceed by action to obtain compensation for any trespass, and no matter how trifling the actual pecuniary damage occasioned may be, a trespass involving a claim of substantial right, or wanton or high-handed conduct, entails substantive injury, for which substantial damages may be recovered, and to restrain which, if repeated, an interdict or injunction will be awarded. So trespasses to property may be guarded against by due precautions, and if these are disregarded a trespass on land may be remedied on the spot by removing the trespasser after requiring him to leave. And again, there are various classes of trespass, for malicious or other unlawful objects, which are expressly made penal. But a law making "wilful trespass" on land penal, universally is, I believe, peculiar to this Colony. It is not for me to express an opinion as to its policy, nor, indeed, have I any disposition to do so. But however proper may be such a general provision, guarded and limited as it is actually by the

law, it could not be tolerable if the word "wilful" were struck out of the law, or filtered away in its application. To see in what an arbitrary spirit it might be used, one has only to reflect on the ordinary engagements and proceedings of life.

A very striking, though no doubt an exceptional illustration, may be found on the records of this Court in a case where the Complainant sought even by proceedings in Review to establish that persons bringing a dying man for aid to a hospital were guilty of a penal offence under this law. Assuredly, the word "wilful," which the Legislature has been careful to insert in so stringent and penal a law, cannot be too carefully kept in sight when a charge is made under its provisions.

Now, if there be anything more clear than another, it would seem this, that a person who claims land as his own, is not guilty of a wilful trespass in peaceably entering on it. If he really have the right to it, he is not guilty of a trespass at all; and if he claims the right he intends or wills no trespass in peaceably exercising it. True, if it be not really his property, his claim to it will not free him from being an actual trespasser or the liabilities incurred as such. He may be kept out; he may be put out; he may be sued for damages or interdict. But if he has no intention to infringe the rights of another, if he believes himself only to be asserting his own, it is absurd to call him a "wilful trespasser."

This principle has been applied over and over again in the cognate cases of theft and robbery. However unlawfully a man may act in taking the property of another, even by violence, if he really believes it to be his own, or that he has a right to take it, no matter how unfounded may be that belief, he is no thief or robber.

The essential ingredients, the will or intention, is wanting, and the offence depending on it has not occurred. If therefore, an alleged trespasser appears to have acted under the real belief that he was entitled to do the act complained of, the Magistrate must acquit him of "wilful trespass."

But the law has been careful to go further, in order to guard against its extension to cases of this nature. Knowing that the rights of persons to immovable property are multiform and subject to a variety of questions of serious legal import, and often of some doubt, and that in the result possession is but a very imperfect evidence, though it is *primâ facie* evidence of title, it has very wisely, plainly, and persistently excluded such questions from that jurisdiction of the Magistrate, not only in this case, but in other cases also.

Thus, the Ordinance in question (Section 10) has provided that it shall not be lawful for any Justice of the Peace to determine any case of trespass, when the right or title to the premises wherein

the trespass is alleged to have been committed shall be at issue between the alleged trespasser and the party in possession.

Now, on either of these considerations, I should have been bound to reverse the Magistrate's decision in this case. It is true, that I should have been loth to do so upon the mere matter of evidence bringing the case within the class of "wilful trespasses," out of deference to the judgment of the Magistrate on a matter of fact so arising. But the clause ousting the jurisdiction does not allow me to defer my own judgment to that of the Magistrate. I feel no doubt in my own mind that the Appellant committed the alleged trespass in the exercise of a right which he claims to the premises in question. The evidence for the Complainant puts this beyond dispute, as I think, and therefore (though the same considerations would govern the case on the merits) it was in fact not competent for the Magistrate to determine the case upon the merits, nor am I compelled to do so.

The evidence of the Complainant's witnesses shews, not only that the Appellant has for sometime past laid claim to the premises in question, and that he formerly was possessed of them, but that he has of late been in possession of a part of these premises, described as "the land aback belonging to this lot."

The Complainant, indeed, in one place says that the Appellant has planted it "within the last four weeks;" but in another place he admits that the Appellant has not only planted, but reaped the corn growing there. It seems strange, indeed, to ignore a "claim" so tangible.

Here surely is ample evidence, not only of claim to the lot in question, but of an actual possession, which as far as appears, was as quiet as that of the Respondent, and which, indeed, (as he asserts title to the whole lot as one tenement, and not merely to the house as a separate tenement) is so far an "adverse possession," furnishing not only a badge or presumption of title in the Appellant, however imperfect, but operating against the claim of the Respondent, however strong.

There are other discrepancies about the statement of the Respondent's case as one of title, if it could be gone into; but I will only notice, as an illustration which this case affords of the danger of entering upon an investigation of those questions of title which have been so carefully excluded from the Magistrate's cognizance, that not only does the admission of the transport put forward by the Respondent serve to shew that the Magistrate was asked to determine a question of title; for in a matter of trespass, as possession is ample *primâ facie* evidence of property, when further evidence is required it is manifest that the title of the possessor is "in issue;" but when it was produced, it by no means sustained the

Respondent's case. I am not referring to the possible existence of matters antecedent to and which might derogate from the transport, or matters collateral or subsequent, on which a claim on the part of the Appellant might arise without derogating from it, but simply to the fact that on its face and in its terms it affords in my judgment by no means conclusive evidence of the Respondent's right to the dwelling house in question. The defects to which I advert, I do not intend to specify, because as I have observed repeatedly, the whole enquiry as to title is foreign to this charge, and incompetent to this tribunal; and I do not desire or intend while thus pointing out the danger of entering on forbidden enquiries to hold out the least encouragement to a claim of the merits of which I can know nothing, or to express even the most passing opinion as to how far the defects to which I advert would be found to embarrass the position of the Respondent, either as Plaintiff or Defendant in a civil action. Indeed, on the whole question of title, I not only do not express the least opinion whatever, but I have not the means even if I had the right to form one. For all that I can tell the Respondent's title may be as indisputable and the claim of the Appellant as worthless as the Magistrate I suppose decreed them; for once more I repeat that, so far from touching this question, the express and only ground on which I deal with this case is that I cannot touch it.

The soundness or unsoundness of a claim to property has nothing to do with its operation in this respect, nor even its reasonableness as a general proposition, though I do not mean to deny that there may be occasional cases in which, in connection with the conduct of the supposed trespasser, the nature and circumstances of the property claimed and the occupancy disturbed may be so far a test of unreasonableness as to be also a test of unreality.

But this must be as to matters of conduct and of fact, and not as depending on matters of law or title.

But then I have heard it contended in these cases—and very idly as I think—that this would place every one at the mercy of every wrong-doer, for how can a Magistrate decide whether a claim is really entertained, or only pretended, unless he is to examine the claim in point of law.

Now, this is wholly an argument *ad invidium* or *ad ignorantium*. For, in the first place, there is nothing that people are less likely to do than to trespass on property of others under pretence of a claim to it.

Nothing could be less profitable, more useless, or more dangerous to persons really strangers to the property than such a proceeding, seeing the ample and summary remedies which, as I have pointed out, the law gives against such trespass. That a person trespassing

for another object, wantonly, or maliciously, or feloniously, might sometimes *set up* such an excuse is no doubt true; but I am sure that the Magistrates have ample intelligence and judgment to enable them to deal with such a case without going into an enquiry into title. The man's conduct and matters of fact legitimate to lead to a judgment, will always be found to serve to determine such cases.

Here we have one totally dissimilar, but which may be considered as illustrative of what may occasionally recur in practice. The Appellant, it is said, had no sort of claim in law, and the Respondent is lawfully possessed; so be it.

Yet the Appellent's Counsel shews that he really maintains such a claim, however infirm, or even confounded in law it may be, and that he entered on the house in question *in assertion* thereof. Then the law says, that the occupant (the Respondent) may extrude him, and in order to do so may use so much force as is requisite. That if in quiet possession he will be relieved from all penal consequences for such act of force, and if really lawful possessor, he will be equally immune from all civil claim.

This would seem perfectly to satisfy the exigency of the case: when the Appellant was put out the Respondent required no more, and had neither right nor reason to resort to penal process against him as a wilful trespasser. The law does not undertake to protect every one from every annoyance occasioned by adverse claim to property, when in the shape of litigation or possessory acts, not only because it could not, but because in the attempt to do so it would often shut out claims or rights which are not only *bonâ fide*, but sound, and would in fact hand over innumerable properties to the care of the strong hand and long purse. And I am convinced, that if the Appellant will only conceive himself to be in the position of being excluded by a wrongful possessor from his own property, he may feel that in this matter the law really holds a very even hand, so long as the peace is not broken. This it guards against very closely, and whoever in matters of this nature ventures to break the peace, will find himself at once deprived of all protection.

It is sometimes said indeed, by those who look at this matter from a one-sided point of view, that in allowing this freedom of action, the law really encourages disorder; nothing of the kind. The law only sanctions an entry if effected quietly. If the person effecting it even forces an outer door or fastening, or if he offers violence to any person in possession, and opposing him, he will be chargeable for so doing; and when the entry has been effected, (though never so quietly) still the occupant so entered upon, if he has been in quiet possession for any period, may proceed, either immediately, or within such time as may be reasonably required

to obtain aid, to put him out, and if in so doing no undue force is used, the Claimant may offer none but a passive resistance. If he should strike a blow, he will place himself in the wrong part, as the other will be in the wrong should he use undue (which means unnecessary) force. One point yet the law provides for, as necessary to keep the grounds clear and quiet for the solution by civil process of such conflicting claims, and that is, that if an occupant in quiet possession should be evicted by surprise or force, before he can resort to, and obtain requisite assistance, he may (within such a limited time as may be necessary to obtain such) even force open outer doors and fastenings, and use all necessary force (and no more) to regain possession; and if in such proceeding any manual resistance is offered, such resistance will be an assault, and the parties punishable for such. The only places which Constables have in such an event is, that as in other cases where a breach of the peace is apprehended, they may be present in order to guard against it.

Thus every point and event is guarded by provisions as carefully addressed as possible to maintain peace and order on the one hand, and on the other to protect Claimants on both sides in the exercise, enjoyment and assertion of their Civil rights. To treat a Claimant of land effecting a quiet entry as a wilful trespasser under the Ordinance in question, is not only to proceed counter to its express provisions, but tends to disintegrate the whole system so carefully contrived.

I therefore cannot hesitate to reverse the Magistrate's decision in this case.

Independently of the main question, indeed, the Magistrate's order must have been discharged owing to a defect in the sentence which he has awarded against the Appellant.

I have repeatedly had occasion to point out how essential it is that such orders should exactly conform to the law. The law is very plain, that, where not otherwise expressed, all fines imposed in cases of Summary Conviction, shall be levied on the goods and chattels of the Defendant by distress and sale; and it is only where sufficient distress shall not be found, or where it shall be *made to appear* to the Magistrate that the Defendant has no goods and chattels, or that it would be ruinous to him to levy on them, that he may proceed to imprison the Defendant. Now, here the Magistrate has sentenced the Appellant to be imprisoned if the fine be not paid on the presentation of the d stress warrant.

This no doubt, occurs by oversight, but is a singular oversight; as not only does the sentence not conform to any alternative of the law, but it is inconsistent on the face of it; for it gives no opportunity for the distress warrant to be executed before the imprisonment which can only be imposed as an alternative; and indeed,

unless I were to assume a great irregularity in the execution of process under this order, in default of payment not only would the Appellant be imprisoned, but the fine would be levied also. In this respect therefore, the sentence would be illegal independently of the more fundamental objection of the conviction.

F. DE SOUZA v. T. G. WIGHT, REVENUE OFFICER.

23rd November, 1867.

(Ordinance 14 of 1861.)

Crown Lands—Jurisdiction of Superintendent and Magistrate—Abbreviation of title—Evidence—Costs.

THIS was an appeal from the decision of Mr. CHARLES COX, S.J.P., on a claim made by Appellant, for three thousand shingles and a punt containing the same, which had been seized by the Respondent (a Revenue Officer) on the grounds that the shingles had been cut on ungranted Crown Lands.

The Magistrate rejected the claim, and condemned Appellant in costs. The Judge dismissed the Review.

BEAUMONT, C. J., gave judgment as follows:—

In this case, the Appellant brings in Review before me the proceedings had before Mr. Charles Cox, styled as "S. J. P.," Acting Superintendent of Rivers and Creeks, Demerary," dismissing a claim made by the Appellant to some shingles and a punt which were alleged to have been illegally seized by Mr. T. G. Wight, as Revenue Officer.

The 1st and 2nd reasons assigned for this appeal, are to the effect that Mr. Wight was only entitled to make such seizure within the limits of his district, and not to seize on land beyond those limits. But assuming the first proposition to be true, there is still no evidence in support of the second; and as this is a statutory claim advanced on the footing of Mr Wight's having made the seizure in question as Revenue Officer, the onus lies on the Appellant to show that he in fact made it beyond the limits of his district. But as no evidence as to the limit of his district appears, this ground of appeal fails.

The 3rd, 5th, 6th, 17th, 18th and 21st reasons involve a similar objection viz., that the "Magistrate" as he is here styled, had not jurisdiction to entertain this claim, and curious as the objection

on the part of the Claimant seems, I shall have to return to it presently.

The 7th, 8th, 9th, 10th and 11th reasons assigned are to this effect, that the Appellant ought to have had, and yet had not full opportunity to adduce all necessary evidence in support of his claim. That he was entitled to such opportunity is clear, but I think it equally clear that he had it to the full extent, consistent with regular procedure. The allegation as to there having been some attempt to intimidate him in maintaining his claim, I must entirely disregard, as it is wholly unsupported; but I must observe on the one hand, that unless it could be supported it should not have been made; and on the other hand, that if it were well-founded, it would be ground for much more direct and serious proceedings, either to punish the party so acting for contempt, or upon indictment for conspiracy, or for misdemeanor, or extortion, or malversation of office.

The 4th, 12th, 13th, 14th, 15th and 20th reasons dispute the legality of the seizure, or its merits, as I may say.

The 16th and 22nd reasons are merely ornamental ones, which do not require specific notice; and thus the substantial points for my consideration are two, that as to the jurisdiction of the Court below, and that as to the merits of the claim.

The point as to Mr. Cox's jurisdiction, is somewhat similar to that raised as to Mr. Wight's authority; but it is subject also to other considerations, and chiefly to this, that whatever may be the precise character in which he has acted, (whether properly as Superintendent of Rivers and Creeks, or as Stipendiary Magistrate) it has been as exercising the functions of a Magistrate or Judge of limited jurisdiction, that the first condition for the validity of all such acts is that every particular to shew jurisdiction must appear on the face of the proceedings, and that nothing can be presumed, or (as it is said) "intended" in support of them.

Now, in this case, if I could advert to matters *dehors* the case before me, I could not but feel the utmost doubt as to whether Mr. Cox had any jurisdiction, either as Magistrate, or as Superintendent, to entertain this claim; but not only must I deal with the case as it appears on the papers before me, but I cannot admit the Appellant to raise the question *ex parte suâ propria.*

The case upon this head stands thus—The claim is put forward as a statutory one, made under the provisions of Section 41 of Ordinance 14, anno 1861; the cognizance of which is expressly conferred upon certain officers, styled "Superintendents of Rivers, "Creeks, Crown Lands and Forests." Those officers are undoubtedly officers to whom, according to law, certain districts are allotted,

and whose powers are to be exercised within those districts, while it is especially provided that the Stipendiary Magistrates *within their respective districts*, where there may be any Rivers, Creeks, Crown Lands or Forests, for which no Superintendent is "specially "appointed," shall have and possess the jurisdiction of "Superin- "tendent." Without going into a detailed examination of the various provisions of the Ordinance, and without losing sight of various discrepancies, and difficulties which some of these provisions may seem to give rise to, it is, I think, clear that the jurisdiction of the "Superindendent" is clearly a local one, to be exercised by him within, and as to matters arising within the district to which he is specially appointed, and to be exercised as to matters arising in any locality for which no such officer is "specially "appointed" by the Stipendiary Magistrate of the district comprising that locality.

Then comes the question, whether Mr. Cox appears to have been entitled in either of these characters to deal with this seizure? I think it clear that he does not appear to have acted in the office or character of Stipendiary Justice. The letters "S. J. P.," I put entirely out of sight indeed, as I must decline to treat them as shewing any jurisdiction or office. But even could I take them in favour of either party, to mean "Stipendiary Justice of the Peace," that would not help the case; because (whatever may be the general rule as to the local limits, or extent of jurisdiction of the Stipendiary Magistrate in this Colony, as to which there seems to be a good deal of doubt) this particular jurisdiction is expressly committed and confined to the Stipendiary Magistrate of the district, and there is nothing in the proceedings to shew that this case arose within any district of which Mr. Cox is Stipendiary Magistrate.

When I come to ask whether he appears to have acted as "Superintendent of Rivers, Creeks, Crown Lands and Forests," the answer is not so easy; and indeed, it varies according to the sense in which it is asked. If either of the parties were entitled to contest the point, I think that I could not hold that the jurisdiction appears with that distinctness which is necessary to bind one resisting it. But in fact both the parties to this proceeding have resorted to it; the Respondent actually maintains it, and the Appellant, I think, is debarred from now impugning it. He, indeed, is not only the Claimant, but he brought his claim before Mr. Cox, under this very style of "S. J. P., Superintendent of Rivers and "Creeks, Demerary." True, it is put forward by the reasons of appeal, that in bringing this claim, he did not really take the initiative, but merely *appeared* (so to say) in order to prevent a sale being effected under the provisions of Section 41, by Mr. Cox assuming to act in some official character thus expressed, and that therefore he is in fact rather in the position of a Defendant resisting

an incompetent jurisdiction, than of a Plaintiff resorting to the *forum* of his choice.

In this argument I think there is much force, though to afford it full play, I think that the facts should have been more directly before me. But giving the fullest scope to that argument, what is the analogy? Why that a Defendant so appearing must except to the jurisdiction by way of plea or protest. If he does so he may at all times avail himself of the objection. If he does not, he is held to waive it as far as his proper right goes. True, it is, that consent gives no jurisdiction, and so, if and whenever an actual defect of jurisdiction is apparent, it needs not to say that it cannot be duly exercised. But, it is one thing for a Court, either of first instance or of appeal, to see in the face of a case that there is no jurisdiction, and it is altogether another thing for a party to those proceedings, to urge that the proceedings are voidable for defect of jurisdiction, or because the jurisdiction does not clearly appear although he has himself invoked the impugned authority or waived his objection to it. I do not forget that in the case in question there was no place for a formal plea or protest to this jurisdiction, and that in fact the objection was taken orally and *in limine* before the Magistrate. But really, that only shows more strongly the anomaly of the whole proceeding, and that (assuming that Mr. Cox really was acting beyond his jurisdiction) a remedy by action or interdict would have been more appropriate. The Claimant could not rationally protest against his own claim being entertained; his protest must have been against the sale being proceeded with, and, giving him full credit for desiring to avail himself of the form of a summary statutory proceeding, for this purpose in order to avoid more costly and dilatory litigation, still he must take that advantage *cum onere* and so conclude in effect the question of jurisdiction.

Still, as I have said, that concession would not enable me to overlook the defect of jurisdiction if that were actually shewn, though it is difficult to say how in that case I could deal with the matter. But even if I could have admitted the Appellant to make out the substantive matter on which in his reason of appeal he relies to impugn Mr. Cox's jurisdiction in this case as "Superintendent," those matters are *not* shewn before me, and whatever reasons I may have in my own mind to think them well founded, I do not think that I can, sitting here, act on those, as I have no judicial cognizance of the local limits of the districts, either of the Stipendiary Magistrates or "Superintendents." I therefore cannot look beyond the proceedings in the case, and cannot of my own accord and in a case like this where the parties have both acquiesced and to the jurisdiction now impugned, assume that there is an entire want of jurisdiction as made palpable either positively

by evidence or negatively by an entire absence of any appearance of jurisdiction.

Now, it does not, as I have said, appear positively that Mr. Cox had no jurisdiction to entertain this claim *either* as Magistrate or Superintendent. Negatively, as I have said, it does appear that he had no such jurisdiction as Stipendiary Magistrate. But I do not think it is thus palpable that he had no such jurisdiction as Superintendent. On the other hand there is at least a colour of jurisdiction alleged in that character which on the whole, I think that I must recognise where the parties do not or cannot be admitted to contest it. He is styled "Acting Superintendent of Rivers and Creeks, Demerary" and though his office is not duly described in style, I think that I may discard the word "Acting" by giving to it its popular meaning, and that in this particular case and to the limited extent to which I now give it effect, I may overlook the defect of description. Then, the papers shew that this matter arose in Demerary, both in the Rivers and County of that name, and the Superintendent dealt with the case in Georgetown which I may judicially take in this case to be on the bank of the River and in the County of Demerary; and this being so, although I by no means think that the jurisdiction duly appears, and however defective it may be in fact, I conclude that I am not entitled to say that the want of jurisdiction is so palpable, that I am called on to treat the proceedings as nugatory and *coram non judice*. I have gone thus fully into this point in order that it may be plainly understood that I in no way uphold or assert the jurisdiction resorted to in this case. I have not indeed the occasion to impugn or deny it, but I would feel more than I do, the responsibility of thus tacitly leaving the case to take its course on this point were it not that both parties have by their acts conceded or acceded to the jurisdiction.

Coming now to the question of the merits, I need not advert specially to the case of the punt, because (as far as this claim of De Souza is concerned, at all events) the right to the shingles will dispose of the case; and here I must express my surprise, that there should be so much elaboration of worthless evidence about boundaries of lands which has no bearing whatever on the case, while the real point is left almost untouched. For the only really permanent evidence is that of Gomez, who says that "half the "shingles were cut on Mr. Duff's land, and half on Mr. Bugle's "land." Now to my mind this statement, general as it is, and though corroborated only by Allicock's statement, as to De Souza's hiring Mr. Duff's land, is quite sufficient in the absence of any contradiction to establish a *prima fácie* case.

I discard all that has been said as to the obligation on Mr. Wight to make out his case. Treating the case as I do, as one of

a seizure and claim under the Ordinance, I look to the Claimant to discharge himself of this *onus* cast on him by the law of making out his claim. But while it is neither my inclination nor my business to criticise the propriety of the law, in throwing such an onus upon persons disturbed by acts of seizure such as these, this is plain to my mind, that in applying it every thing should be taken as far as possible in favour of the Claimant, and that a very slender amount of evidence ought to suffice in aid of possession to make out a *primâ facie* case. By using this phrase *primâ facie*, I do not mean that such a case might be afterwards strengthened, for (except by rebutting the counter case for the seizing officer) it could not.

But I know that the difficulty of making out such as would be necessary to establish a conclusive title to such articles as shingles and timber, is very great indeed, and that to require evidence of a very strict or exact kind is not only inapplicable, but in support of possession (which is itself a preferent circumstance of evidence in the absence of any proof of illegality in that possession) it appears to me that it would be most inequitable. At the same time it must be owned that Gomez's evidence is exceedingly vague and general, and as the Claimant's non-appearance under the circumstances was a matter calculated to excite suspicion, I do not think that I should be justified in interfering with the conclusion of the Magistrate upon the evidence as it stands. The conclusion of the Court below from matters of fact and evidence, unless evidently swayed by some misapprehension of law or principle, or so entirely inconsistent with what may appear to the Court above, the direct and palpable result of the evidence as to appear unreasonable or perverse, it is not desirable, or even right for the Court of Appeal to disturb. And I am the less disposed to do so in this case, as I observe from the Superintendent's observations, appended to it, that he appears to be fully alive to the impropriety of such seizures being made on speculation or loose information. Beyond question, such a procedure is not only wholly illegal, but must, if it should ever obtain ground, operate most injuriously, not only to individuals engaged in the industry which would thus be imperilled, but to the public welfare. It is not without some misgiving, lest the failure of the claim in this case, well-founded as it would seem to my judgment, should encourage some such proceeding that I dismiss this application in Review. Still I must not allow such impressions (produced perhaps partly by what has appeared before me lately in other cases, as well as by what has appeared in this) to disturb my judgment upon particulars of this case.

And therefore, I do dismiss the review, and although I feel considerable doubt as to the justice of dismissing it with costs, on the whole, I think it better to pursue the general rule and let the costs follow the event.

E.J.C.
11/28/11

END OF VOL. I.